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CONSIDERATIONS OF EQUITY IN INTERNATIONAL ARBITRATIONS
WITH SPECIAL REFERENCE TO TERRITORIAL AND BOUNDARY DISPUTES

Submitted for the degree of Ph.D.

By

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ABSTRACT

In view of the growing reference to equity in recent international treaties and arbitral and judicial decisions, an attempt is made first to ascertain equitable provisions in arbitration clauses. While there are no marked differences between general arbitration clauses and compromis in the wording of the basis of decision, the latter tend to have more particularized expressions conducive to the settlement of the dispute concerned for which they are drawn up.

Then some arbitral and judicial decisions of territorial and boundary disputes, a vital concern of States, are examined to see how equitable considerations are given in the application of an equitable or legal basis of decision. In some cases equitable considerations in procedural matters are found to have led to such considerations in substantive matters as well. In a majority of cases they have taken the form of considering their special or relevant circumstances, often balancing them up. Some tribunals may even be suspected to have gone beyond the bounds of law, presumably to meet the overriding requirement of an equitable solution of the dispute concerned.

But this reflects the growing awareness of the importance of consideration of all the relevant circumstances of a given dispute, rather than the traditional mode of strict application of the law by singling out such circumstances as are amenable to it. In some cases the relevant circumstances may as well be put in historical and cultural perspective.

Despite the persistent, generally tenable criticism on the application of equity in international law for its subjectivity, the fact cannot be denied that some States conclude compromis or general arbitration treaties with equitable provisions for the basis of decision. The reason is perhaps to meet the emerging necessities of international relations.

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Table of Abbreviations

<u>Actes et Documents</u>	<u>Deuxième Conférence internationale de la Paix, La Haye, 15 juin-1 octobre 1907, Actes et Documents</u>
<u>AFDI</u>	<u>Annuaire français de Droit international</u>
<u>AJIL</u>	<u>American Journal of International Law</u>
<u>AJIL Off. Doc.</u>	<u>American Journal of International Law, Official Documents</u>
<u>BFSP</u>	<u>British and Foreign State Papers</u>
<u>BYBIL</u>	<u>British Year Book of International Law</u>
<u>CYBIL</u>	<u>Canadian Year Book of International Law</u>
<u>De Clercq</u>	<u>De Clercq, J., Recueil des Traités de la France, 1713-1906 (23 vols.)</u>
<u>Feller</u>	<u>Feller, A.H., The Mexican Claims Commissions 1923-1924: A Study in the Law and Procedure of International Tribunals, 1935</u>
<u>Habicht</u>	<u>Habicht, M., Post-war Treaties for the Pacific Settlement of International Disputes: A Compilation and Analysis of Treaties of Investigation, Conciliation, Arbitration, and Compulsory Adjudication, Concluded during the First Decade Following the World War, 1931</u>
<u>Hertslet</u>	<u>Hertslet's Commercial Treaties: A Collection of Treaties and Conventions between Great Britain and the Foreign Powers, 1354-1921</u>
<u>ILM</u>	<u>International Legal Materials</u>
<u>ILR</u>	<u>International Law Reports</u>
<u>La Fontaine</u>	<u>La Fontaine, H., Pasicrisie internationale: Histoire documentaire des Arbitrages internationaux, 1902</u>

<u>Lapradelle-Politis</u>	<u>De Lapradelle, A. et N. Politis, Recueil des Arbitrages internationaux, tome 1: 1905; tome 2: 1923; tome 3: 1954</u>
<u>LNTS</u>	<u>League of Nations, Treaty Series</u>
<u>Malloy</u>	<u>Malloy, W.M., Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers 1776-1909, 2 vols.; Continuation 1910-1923, 1 vol.</u>
<u>Manning</u>	<u>Manning, W.R., Arbitration Treaties among the American Nations to the Close of the Year 1910, 1924</u>
<u>Martens</u>	<u>Martens, G.F. de, Recueil des principaux traités d'alliance, de paix ..., 1761-1808</u>
<u>Martens NR</u>	<u>Id., Nouveau Recueil de traités ..., 1808-1839</u>
<u>Matrens NRG</u>	<u>Id., Nouveau Recueil Général de traités ..., Ie série, 1840-1873; IIe série, 1873-1907; IIIe série, 1908-1943</u>
<u>Moore</u>	<u>Moore, J.B., History and Digest of the International Arbitrations to Which the United States Has Been a Party, 6 vols., 1898</u>
<u>Oellers-Frahm - Wühler</u>	<u>Oellers-Frahm, K. and N. Wühler, Dispute Settlement in Public International Law: Texts and Materials, 1984</u>
<u>Parry</u>	<u>Parry C., Consolidated Treaty Series</u>
<u>Procès-verbaux</u>	<u>Permanent Court of International Justice, Procès-verbaux of the Proceedings of the Advisory Committee of Jurists 16 June-24 July 1920, 1920</u>
<u>Ralston-Doyle</u>	<u>Ralston, J.H. and W.T.S. Doyle, Venezuelan Arbitrations of 1903, 1904</u>
<u>RBDI</u>	<u>Revue belge de Droit international</u>
<u>Records, Committees</u>	<u>League of Nations, The Records of the First Assembly: Meetings of the Committees, 2 vols., 1920</u>

<u>Records, Plenary</u>	<u>Id., The Records of the First Assembly: Plenary Meetings, 1920</u>
<u>RGDIP</u>	<u>Revue générale de Droit international public</u>
<u>RIAA</u>	<u>United Nations, Reports of International Arbitral Awards</u>
<u>Sommaire général</u>	<u>Conférence internationale de la Paix, La Haye, 18 mai-29 juillet 1899, Sommaire général, 4 parties, 1899</u>
<u>Stuyt</u>	<u>Stuyt, A.M., Survey of International Arbitrations 1794-1970, 1972</u>
<u>UKTS</u>	<u>United Kingdom, Treaty Series</u>
<u>UN Systematic Survey</u>	<u>United Nations, Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948, 1949</u>
<u>UNTS</u>	<u>United Nations, Treaty Series</u>
<u>ZaöRV</u>	<u>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</u>

Introduction

It used to be said that States, and especially the newly independent States, were not willing to submit their disputes to the International Court of Justice,¹⁾ because they feared that under Article 38 of the Court's Statute, the customary international law, in the formation of which they had not participated, might be applied if they had brought their disputes to it.²⁾

The reluctance of States to go to the International Court has since waned, and over the past few years more Third World States have had recourse to it than developed Western or socialist States.³⁾ They nevertheless still seem to entertain the complaint of inadequacy in the applicable law of the Court. Viewed in a broader perspective, their dissatisfaction extends to international law in general or at least to some parts of its traditional rules which in effect they maintain are inequitable.⁴⁾

When placed in historical perspective, however, a conflict of norms between the older and newer actors in the international arena is not at all unusual.⁵⁾ The controversy between the Grotian mare liberum and Selden's mare clausum and the political and economic circumstances of that time is one example, and in the history of the development of modern international law examples of this kind abound, the most recent one being the Third United Nations Conference on the Law of the Sea.

Under these circumstances the question which has sprung up to the mind of this writer is whether equity could work to fill the gaps in legal thinking between the East and the West and the North and the South.⁶⁾ Whilst there seem to be more writers who respond negatively to the question than those who expressly admit the positive role of equity, there is growing recognition directly or indirectly that equity does have an important part to play in the international law of today and tomorrow.

The tendency may be observed in the change which took place in the attitude of Sir Gerald Fitzmaurice towards

equity between the years 1952 and 1970. In a paper read before the Grotius Society at its meeting in Cambridge on 25 July 1952, discussing "The United Nations and the Rule of Law", Fitzmaurice said that the "idealist is the most dangerous of all the enemies of the Rule of Law",⁷⁾ and went on to contrast him with the Romans:

"What the Romans were concerned with was system, principle, certainty, regularity, good sense, practical possibilities. In achieving these things, they achieved justice, so far as in a fallible world it can be achieved. The reverse side of this process (and indeed the proof of its validity) may be seen in those systems which, like the English system of Equity, began as deliberate and conscious attempts to do abstract justice in cases where the ordinary law was held to be harsh or defective, but yet which ended as bodies of rules and principles not less elaborate and systematic than the law they were supposed to supplement or supplant--ended in fact as law themselves."⁸⁾

Here the author takes a negative attitude towards equity in favour of the certainty and regularity of law. But eighteen years later a change of mind seems to have occurred in his separate opinion in the Barcelona Traction, Light and Power Company, Limited case (second phase) of 1970. In a section, entitled "Equitable Considerations and Equity as a System", though a small part of his whole statement, Fitzmaurice discussed equity in general terms and, in so far as equitable considerations were concerned, dissented from the judgment.⁹⁾ One year before in the North Sea Continental Shelf cases of 1969 he aligned himself in voting for the judgment, and thus may be interpreted as having set count on equity if it was a judgment of equity. A few years later considering the same question, he asked "what are the principles and rules of equity that would be suitable for application in the international field--not on a basis ex aequo et bono but as

legal principles that must enter into every decision of an international tribunal to which they may be material" in his Special Report to the Institut de Droit International at its centenary.¹⁰⁾

To turn to international practice, there are two major categories of practice in which support of the growing importance of equity is evident. In the first place, some recent arbitral and judicial decisions on the delimitation of continental shelf boundaries have tended to emphasize the importance of the application of "equitable principles" provided that the "relevant circumstances" of each case are taken into account. Thus due account was taken of the socio-economic, geographical and historical factors in the North Sea Continental Shelf, Anglo-French Continental Shelf, Tunisia-Libya Continental Shelf, Gulf of Maine, Guinea-Guinea Bissau Maritime Boundary Delimitation, and Libya-Malta Continental Shelf cases.¹¹⁾

Secondly, there has been a tendency in the field of the management of resources to stress the importance of their equitable utilization. Among the recent decisions, those in the Fisheries Jurisdiction cases (merits) of 1974¹²⁾ are an example of this. The resolution of the Institut de Droit International on the "Utilisation des eaux internationales non maritimes (en dehors de la navigation)" of 1961¹³⁾ and the International Law Association's "Helsinki Rules on the Uses of the Waters of International Rivers" of 1966¹⁴⁾ are two major attempts, formally but of a private nature, at codification of pertinent rules on water use. Another recent codification and progressive development of the law of the sea is the United Nations Convention on the Law of the Sea of 1982 which contains frequent references to equity in its provisions.¹⁵⁾ The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983, too, includes some clauses providing for equity.¹⁶⁾

Perhaps it is in view of these developments that writers have come to discuss equity in particular when considering the distribution or management of resources.¹⁷⁾ This has been the case in the delimitation of continental

shelf boundaries, which is to be found in some recent arbitral and judicial decisions, where the foremost concern of the States involved¹⁸⁾ has been the implication of the decisions on their rights to explore for and exploit submarine petroleum and natural gas resources. This is why there are so many books and articles on this particular topic that an annotated bibliography on maritime boundary delimitation of 1983 has as many as 580 entries.¹⁹⁾ And this is by no means an exhaustive list.

While maritime boundary delimitation will remain a major field in which equity is expected to play an important rôle in the years to come, other areas like human rights, international economic law and particularly the law of indemnification in case of nationalization would likewise be amenable to the application of equity.²⁰⁾ Of potential importance could be cultural values in their relation to international law. The very idea of the Hague Academy of International Law, in collaboration with the United Nations University, sponsoring a workshop on "The Future of International Law in a Multicultural World" in 1983²¹⁾ is a reflection of the growing awareness of the potential importance of the impact of different cultures on international law. A variety of opinions were presented at the Workshop. Majid Khadduri stated that non-Western cultures could also provide the fundamental concepts of law and general principle for international law;²²⁾ Adda B. Bozeman stressed the diversity of law-related customs and values in the world;²³⁾ Antonio Cassese spoke of the tendency of developing countries to conceive law as one of the instruments for exercising authority²⁴⁾ and to prefer, in the international arena, to work with general principles rather than detailed and precise rules;²⁵⁾ K. Mbaye emphasized the African peoples' preference for dialogue and conciliation over adjudication;²⁶⁾ René David saw the tradition unchanged behind the Westernized façade in non-Western societies;²⁷⁾ Sompong Sucharitkul attributed the hesitation of newly independent States in accepting the existing rules of customary international law to the lack of "humanistic characteristics" in the traditional

international law.²⁸⁾

On the other hand, Guy de Lacharrière, commenting on Article 9 of the Statute of the International Court of Justice, maintained that cultural diversity "se ramène ... à l'aspect formel, extérieur des choses"²⁹⁾, while R. P. Anand pointed out that it was national interests, rather than religious philosophies or cultural traditions, that accounted for the apathetic attitude of new Afro-Asian States towards international adjudication.³⁰⁾ Mohammed Bedjaoui was of the opinion that culture was "built in" in international law.³¹⁾ But H. Sanson asserted that the interests of either the State or the individual are always evaluated by a cultural judgment.³²⁾

Whatever one might think of these presentations, one could fairly conclude, as does René-Jean Dupuy, that those observations from comparative points of view enlighten international lawyers on the misunderstanding between Third World lawyers and Western lawyers who remain attached to positivism.³³⁾

In addition to those trends which favour a growing resort to equity, mention must be made finally of what may be termed the raison d'être of equity in international law. Both scholarly writings, from Aristotle down to contemporary writers, and practical reports³⁴⁾ often make reference to the basic nature of equity and practical reasons for its functions. In his Nicomachean Ethics, Aristotle has this to say on the basic nature of equity:

"When ... the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question. Hence, while the equitable is just, and is superior to one sort of justice, it is not superior to absolute justice, but only to the error due to its absolute statement. This

is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality. ...

"... it is a special kind of Justice, not a different quality altogether."³⁵⁾

Writing on "Conscience and Independence of the Judge", Kotaro Tanaka states with emphasis that "the true judgment must be a declaration of justice and equity made with the power of character of the judge in respect of the particular case."³⁶⁾

In a world of politicization, such as that of today, co-existence of diverse political cultures requires accommodation and the sophistication of conflict resolution.³⁷⁾ This admittedly difficult undertaking would call for a new kind of sophistication which could even collide with the traditional methodology that has been developed in a context of comparative homogeneity. This is not, however, to say that no efforts have been made in this direction. In the late 1920s and the early 1930s there was a strong movement for the establishment of methods for the peaceful settlement of international disputes.³⁸⁾ Some writers then argued for a separation of the functions of judicial settlement and arbitration on the grounds that political disputes were more amenable to settlement by arbitration on the basis of equity.³⁹⁾ This may be a reflection of the numerous bilateral treaties on arbitration, conciliation and judicial settlement, prescribing different modes of settlement for legal and non-legal disputes.⁴⁰⁾

In a sense the trend has revived since the end of the Second World War. Interestingly enough there has recently been a tendency for States to prefer arbitration to judicial settlement if they have to choose adjudication. The recent Chamber of the International Court of Justice composed for the Gulf of Maine case is something akin to an arbitral tribunal.⁴¹⁾ If the preference for arbitration is as real as it is sometimes said to be,⁴²⁾ it would imply not only the State's desire to control the choice of

arbitrators but also, it is submitted, the State's expectation of the tribunal's application of law with equity, or equitable principles, for an equitable solution of the dispute. According to the Netherlands Government, "the somewhat mediatory quality of the award should be first in our mind". Here is more of the Netherlands comment on the draft Model Rules on Arbitral Procedure:

"Though arbitration must be kept on the 'basis of respect for law' ... the award, however, will always show a predisposition towards mediation and arbitrators are prone to adhere to the law in a less orthodox way than a judge is apt to do, as soon as they consider such deviation more in keeping with general principles of law and equity. The rule dura lex sed lex will be less resorted to by arbitrators than by judges."⁴³⁾

On the basis of the problematique of equity in international law as described above, the present study will be started with some preliminary reflections on the concept of equity. This will be followed by a Chapter analyzing arbitration clauses with equity or equity-equivalent provisions. In the next Chapter arbitrations of territorial and boundary disputes will be discussed to see how equity is applied in the actual arbitrations. But the analysis will be confined to territorial and boundary cases; although equity is resorted to in a larger measure in claims or damages cases, they are, despite their enormous number, of less importance to the parties. Territorial and boundary disputes are of vital importance to the States concerned, and it is hoped that applications of equity in this category of cases will provide a variety of good illustrations of the functioning of equity, because these cases involve more complicated circumstances in which applications of equity can be more varied than in damages cases. This analysis of arbitral and judicial cases will be supplemented by a discussion of their theoretical aspects.

Chapter I

Preliminary Considerations of the Concept of Equity

At the outset of this study it is essential to attempt to give a working definition of the concept of equity, which will serve as the basis for its further elaboration.

1. Diverse Meanings of Equity

It is proposed in this study to understand the term "equity" in its general sense, rather than in its technical sense such as is found in Anglo-American law.¹⁾ While both senses of equity certainly have much in common, as the history of English equity shows,²⁾ the problem of equity in international law today, as heretofore, seems to be to ask the question "What is equitable?", rather than to apply technical principles of equity, in the relations between States. Probably because of the general sense in which it is used, diverse meanings are given to the word equity.³⁾

In a recent, eminently equitable judgment in the North Sea Continental Shelf cases of 1969, the International Court of Justice defined what was involved in the matter of delimitation as "not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles".⁴⁾ This interpretation of equity as involving the application of a rule of law requiring the application of equitable principles, which largely followed the contention of the Government of the Federal Republic of Germany,⁵⁾ is a clear understanding of equity. It is not, however, a generally accepted interpretation of equity. The express reference to equity or expressions having equivalent effect in the numerous arbitration clauses would rather seem to show that there is disagreement among States on its meaning, as will be seen later.⁶⁾ Writers are likewise divided as to what equity is.⁷⁾

On the other hand, some attempts have been made to identify the concept of equity in the light of its

functions. For example, J. C. Witenberg divides the function of equity into two: on the one hand,

"l'équité s'exerce dans les limites de la règle de droit, ou si elle s'en éloigne, pour la prolonger, ne le fait qu'avec prudence et timidité. Elle est moins une source de motivation, qu'une méthode d'appliquer aux cas concrets les principes habituels de la motivation."⁸⁾

On the other hand,

"l'équité constituerait une source de droit et de motivation 'indépendante' et autonome, remplissant dans le cadre des sources de la motivation 'un rôle complémentaire ou supplétif' (de Visscher)."⁹⁾

Two functions of equity are identified also by J. H. W. Verzijl who, acting as the Presiding Commissioner in the arbitration of the Georges Pinson case of 1928, defined them in these words:

"l'équité [est] invoquée encore comme principe supplémentaire de décision dans les cas où le droit positif est silencieux, ou comme correctif dans les cas exceptionnels où l'application du droit strict amènerait à des résultats évidemment injustes. Dans le premier cas, l'équité fait fonction de source subsidiaire de droit international; dans le second, invoquer l'équité équivaut à confesser que le droit positif, comme toute oeuvre humaine, est imparfaite et que, pour cela, il a quelquefois besoin de correction par un principe supérieur, qu'on l'indique par justice ou par équité."¹⁰⁾

Witenberg's second function of equity is understood to grant "pouvoir pour le juge sinon même de faire complète abstraction des principes juridiques reconnus, en tout cas de construire une solution de toutes pièces dans les cas

où, à défaut de règles de droit, chacun des Etats litigants serait en principe pleinement indépendant pour agir en un sens ou en l'autre".¹¹⁾ This seems to imply the function of supplementing the lacuna of law, and correspond to Verzijl's first function. Thus the two classifications of functions of equity mean in fact an identification of three functions.

Witenberg predicted that a controversy would be inevitable over the two concepts or functions of equity,¹²⁾ as indeed diverse meanings have been given to equity in the practice of States, arbitral and judicial decisions, and scholarly writings. But there seems to be general agreement on the classification of three functions: (1) the modification of law to apply it to particular facts; (2) the supplementing of law by filling in 'gaps' in the positive law; and (3) the correction of law, or its supplanting as a distinct basis of decision.¹³⁾ These correspond to equity infra legem, equity praeter legem and equity contra legem.¹⁴⁾ In practice strict distinction of these functions would be almost impossible or even useless,¹⁵⁾ however apposite or plausible it might be from theoretical points of view.

2. Attempts at Clarification of the Meaning of Equity

If the function of equity is classified into three categories, will the meaning of equity as a whole be made clear? There are two major questions which arise in this context. One is whether "equity" and "equitable principles" are the same thing or different, and the other the relationship between "equity" and "ex aequo et bono".

(1) "Equity" and "equitable principles"

In a report of the International Law Commission on the "Succession of States in Respect of Matters Other Than Treaties", prepared by Special Rapporteur Mohammed Bedjaoui in 1979, equity is discussed in some detail, especially in the light of the North Sea Continental Shelf cases. The

relevant part of it is worth quoting here:

"In the view of the Court, 'equitable principles' are 'actual rules of law' founded on 'very general precepts of justice and good faith'. These 'equitable principles' are distinct from 'equity' viewed 'as a matter of abstract justice'."¹⁶⁾

Put simply, "equity" is "a matter of abstract justice", while "equitable principles" are "actual rules of law based on general precepts of justice and good faith". "Equity", in other words, is understood in the sense of natural justice, whereas "equitable principles", in the sense of the judgment of the Court in the North Sea Continental Shelf cases in which the applicable law was found not in the conventional law but in customary law,¹⁷⁾ are part of customary international law. Thus the distinction, however qualified it may be, would seem in itself to be fundamental, for "equity" is understood in the sense of natural or abstract justice while "equitable principles" are understood to form part of the positive law. This would have been implied by the same Court when it said in its judgment in the Tunisia-Libya Continental Shelf case that "'equitable principles' cannot be interpreted in the abstract."¹⁸⁾

The very general nature of "equity" in international law, as compared with the nature of "equity" in national legal systems, is identified in the same case:

"Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a

general principle directly applicable as law."¹⁹⁾
(Emphasis added)

This does seem to imply that equity in international law, being of so broad a nature, can be an independent basis of decision in adjudication.

(2) "Equity" and "ex aequo et bono"

In an effort to clarify the meaning of equity, the second question that could arise is whether the two concepts of "equity" and "ex aequo et bono", different at least in expression, have the same meaning or different meanings. As it will be seen later in Chapter II, they are distinguished in some of the numerous arbitration clauses, but in others they are used as synonymous.

The history of incorporation of "ex aequo et bono" in Article 38 of the Statute of the Permanent Court of International Justice shows that in the course of the discussion of the Advisory Committee of Jurists on the applicable law of the projected Permanent Court the addition of "principles of equity" was proposed, that subsequently in the Sub-Committee of the Third Commission of the League of Nations Assembly the addition of "principles of justice" was proposed, and in the end that the adjustment of the wording resulted in the current "ex aequo et bono".²⁰⁾ The fact that the delegates at the Sub-Committee meetings agreed to the adoption of the phrase with due regard to the previous development of this question would seem to imply that they did not think that a strict distinction should be made between the three different expressions of "equity", "justice" and "ex aequo et bono". It should be noted, however, that the proviso of "if the parties agree thereto" was expressly added to limit the Court's power to decide a case ex aequo et bono. The Advisory Committee of Jurists was silent on such a proviso when it was discussing the proposed addition of "principles of equity".²¹⁾ The very proposal of such an addition failed to be adopted.²²⁾ During the course of the

discussion of "principles of justice" in the Assembly's Sub-Committee, an additional amendment was proposed to attach the phrase "with the consent of the parties", and this was finally adopted.²³⁾ The additional amendment was intended to prevent the Court from acting without regard to the intentions of the parties. But on the other hand it has created a logical possibility that the Court may be enabled by an agreement of the parties to avoid the application of law and decide ex aequo et bono instead.

Thus the legislative history of Article 38 of the Statute implies that "ex aequo et bono" was not to be strictly differentiated from "equity" or "justice". Are these simply different expressions of the same thing then? There are some writers who do not make strict distinction. From an ambitious point of view of advocating "ex aequo et bono pax oritur", Louis B. Sohn does not appear to think it necessary to make the distinction but rather stresses the importance of understanding equity in its broad sense.²⁴⁾ Daniel Bardonnet, in discussing the arbitral award in the Rann of Katch case of 1968, in which the tribunal excluded the idea of acting ex aequo et bono but recognized equity as forming part of international law, raises the following question and seems unwilling to make a clear-cut distinction: "on puet se demander si la décision aurait été sensiblement différente si le Tribunal avait statué sur la base de l'équité au sens général qu'elle revêt en droit international."²⁵⁾ This is supported by A. L. W. Munkman who says: "It is not ... obvious that a different decision would ... have been reached by a tribunal empowered to adjudicate ex aequo et bono."²⁶⁾

But other writers, much greater in number, prefer to distinguish ex aequo et bono from equity. J. L. Brierly says that the power to decide ex aequo et bono is "essentially a power to legislate"²⁷⁾ (emphasis original). At the least he does not expressly say that it includes equity. H. Lauterpacht, too, considers an ex aequo et bono settlement as a "legislative" settlement departing from the existing law.²⁸⁾ Charles de Visscher regards it as "toujours plus législative, souvent même plus politique que

judiciaire".²⁹⁾ C. W. Jenks and G. G. Fitzmaurice understand it in much the same way.³⁰⁾ S. Oda, in his capacity as counsel for a foreign Government in a litigation, argues similarly.³¹⁾

What is common to the views of these writers is that "equity" is thought to blend with law whereas "ex aequo et bono" is not. They seem to share in the intent of the resolution of the Institut de Droit International of 1937, which provides in paragraph 1 that "l'équité est normalement inhérente à une saine application du droit, et que le juge international, aussi bien que le juge interne, est, de par sa tâche même, appelé à en tenir compte dans la mesure compatible avec le respect du droit."³²⁾ But it provides in paragraph 2 that "le juge international ne peut s'inspirer de l'équité pour rendre sa sentence, sans être lié par le droit en vigueur, que si toutes les parties donnent une autorisation claire et expresse à cette fin,"³³⁾ thereby making clear the requirement of express authorization by the parties for the judge to depart from the law. The resolution does not use the phrase "ex aequo et bono" but "equity" throughout, but a comparison of paragraphs 1 and 2 would show that the term "equity" is to be treated differently according to its different functions. The function of "equity" as provided for in paragraph 2 is, it is submitted, that of "ex aequo et bono" in the understanding of those writers.

Does this mean that "equity" has not only the function inherent in a sound application of law but also the function of affording an independent basis of decision apart from the law if the parties agree thereto, whereas only the second function is expected of "ex aequo et bono"? In Article 28 of the General Act for the Pacific Settlement of International Disputes of 1928, however, a decision ex aequo et bono is contingent on the non-existence of the law but not on the agreement of the parties.³⁴⁾ This seems to imply that a decision ex aequo et bono is expected to perform the function of filling a gap in law. This function of filling a gap in law without prior authorization of the parties is rejected by those mentioned

writers among them Brierly who severely criticizes Article 28 of the General Act.³⁵⁾

To turn now to arbitral and judicial decisions for their views of ex aequo et bono settlement, there are two kinds of views. In the arbitral award of the Cayuga Indians case of 1926, the tribunal took the view, on the basis of Anzilotti's view, that the procedure ex aequo et bono "is meant for cases ... which call, not for principles of equity, but for a degree of compromise".³⁶⁾ The Permanent Court of International Justice, in its order of 6 December 1930 in the Free Zones of Upper Savoy and the District of Gex case (2nd phase), stated that an ex aequo et bono power, "de nature absolument exceptionnel devrait résulter d'un texte positif et clair".³⁷⁾ Likewise in the North Sea Continental Shelf cases of 1969 the International Court of Justice rejected any decision ex aequo et bono, "such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute".³⁸⁾ This brief review of case law suggests that the award in the Cayuga Indians case referred to the substantive meaning of a decision ex aequo et bono that it is suitable for cases calling for a compromise, while the Permanent Court of International Justice and the International Court of Justice naturally confirmed the requirement of prior consent of the parties to the procedure.³⁹⁾

The most that could be said from the foregoing is that writers are in broad agreement that "equity" has three functions, that the phrase "ex aequo et bono" may be used for the functions of equity praeter legem and contra legem, and that the phrase is not used to express the subsidiary function of equity inherent in the application of law (infra legem).

3. Expressions Having an Equivalent Effect to Equity

Equity or considerations of equity are often couched in a variety of expressions in general arbitration clauses, compromis and arbitral and judicial decisions.⁴⁰⁾ The

common factor in these seems to be "the consideration of the circumstances peculiar to a given case", however qualified it may be. The three "factors to be taken into account" by the parties in the course of their negotiations, i.e., the geographical and geological factors and the element of proportionality, which the Court mentioned in its judgment in the North Sea Continental Shelf cases,⁴¹⁾ are an example of the "circumstances peculiar to a given case". The reason why these are to be understood as considerations of equity is that they are to be taken into account in the application of "equitable principles" as part of the "principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea".⁴²⁾ Needless to say, what are the peculiar circumstances varies from case to case and they must of necessity be specified accordingly.

Nor would it be necessary to say that equity or equitable considerations, as provided in a treaty clause or given in an adjudication, is the equity or equitable considerations so defined at the time of its provision in the clause or determination by the tribunal. For what was once believed to be equitable may no longer be thought so in the legal context of today. Thus equity must be understood in the context of space and time in which it is applied.

If the "consideration of the circumstances peculiar to a given case", is another expression of equity, it could theoretically fulfill any of the mentioned three functions: it could assist the interpretation or application of law, supplement the lacuna of law, or displace law if necessary.

Chapter II

Arbitration Clauses

It is proposed in this Chapter to make an analysis of arbitration clauses which provide for some form of equity as the basis of decision with a view to ascertaining what the provisions mean in their given expressions. The scope of this enquiry is limited to arbitration clauses in the modern period which, for our purposes, starts with the Jay Treaty or the Treaty of Amity, Commerce and Navigation of 1794 between Great Britain and the United States. Modern international adjudication is generally said to have begun with this treaty.

In this Chapter both general and special arbitration clauses are included for study in order to ensure as broad a basis of enquiry as possible to see what State practice is like in the understanding of the meaning or the role of equity in international arbitration. Thus it would be better to include as many clauses as possible that appear to fall under the general rubric of equity than to choose some and exclude others. In this way a wide variety of phrases are available for analysis.

The clauses are arranged under categories of treaties: General multilateral arbitration treaties; Restricted multilateral arbitration and functional treaties; Bilateral arbitration and functional treaties; and Special agreements for the submission of particular disputes to arbitration.

For the sake of analytical convenience, it is assumed in this Chapter that different words or phrases, even if seemingly synonymous with one another, represent different conceptions. The assumption is made in the hope that in the end it would help an attempt to define the meaning or the role of equity in international arbitration.

1. Multilateral Arbitration Treaties

In this section three major multilateral arbitration treaties are taken up for the discussion of their clauses

which provide for an equitable basis of decision in one way or another: the Hague Convention for the Pacific Settlement of Disputes of 1899; the Statute of the Permanent Court of International Justice of 1920; and the General Act for the Pacific Settlement of International Disputes of 1928.

(1) The Hague Convention for the Pacific Settlement of International Disputes

On 29 July 1899 the First Hague Peace Conference adopted a Convention for the Pacific Settlement of Disputes. Article 15 of the Convention defines international arbitration in a general manner and specifies the basis of decision. It reads:

"L'arbitrage international a pour objet le règlement de litiges entre les États par des juges de leur choix et sur la base du respect du droit."¹⁾

The clause, a codification of the practice of States in international arbitration, provides a basis for decision with the words of "sur la base du respect du droit". It does not say "sur la base du droit", which raises the question of whether there might be some room for other than legal considerations as the basis of decision.

Since no clear difference, except in their expressions, can be made between the two phrases, it is reasonable to have recourse to the travaux préparatoires of the clause.²⁾ According to the Report which M. le Chevalier Descamps, President and Rapporteur of the Comité d'Examen of the Troisième Commission of the Peace Conference, drafted as a result of the discussion and deliberation in his Comité, international arbitration was understood in those days as a third-party procedure not intended to supplement direct negotiations nor to suppress mediation but to point in the direction of what is today termed judicial settlement.³⁾ In the words of the Report, "La justice arbitrale internationale règle--c'est-à-dire termine définitivement--les litiges internationaux qui lui sont soumis. Elles

règle ces litiges sur la base du respect du droit,
conformément aux exigences de la justice. Elle règle par
l'organe de juges choisis en vertu de l'accord des Etats
eux-mêmes. Tels sont les traits fondamentaux de la justice
arbitrale."⁴⁾ (Emphasis added) The Report was adopted by
the Troisième Commission "sans observations" at its 9th
(4th special) meeting on 25 July,⁵⁾ and finally adopted by
the Conference "sans discussion" at its 7th meeting on the
same day.⁶⁾

The Convention was revised and enlarged at the Second
Hague Peace Conference in 1907. But Article 15 of the 1899
Convention remained intact, except for the addition of a
second paragraph, originally proposed by Sweden as Article
40 in the new convention, to become paragraph 2 of Article
37. The article as amended was adopted by the Plenary
meeting of the Conference at its 9th meeting on 16 October
1907.⁷⁾ In short, no change was made in the wording of
Article 37 of the 1907 Convention in so far as the basis of
decision is concerned. Thus one has only to look to the
travaux préparatoires of or comments on Article 15 of the
1899 Convention, if it is necessary to do so, for the guide
to understand the meaning of the phrase "sur la base du
respect du droit".

At the time of discussion of Article 15, it may
perhaps have been felt too early to apply law in its strict
sense. It may also have been felt that application of law
would unduly narrow the scope of arbitration. But on the
other hand there might have been an urge for the
application of law. Hence the formula: "sur la base du
respect du droit", instead of "sur la base du droit". Such
a reasoning may be supported by the qualifying phrase
"conformément aux exigences de la justice" in the
commentary of the Report by Descamps.

Dr. H. Lammasch, who was a member of the Comité
d'Examen of the Troisième Commission at the First Peace
Conference in 1899, later comments that the phrase has no
other meaning than that "the arbitrator shall decide in
accordance with equity, ex aequo et bono, when positive
rules of law are lacking".⁸⁾ The comment would seem to

point towards the same direction as the commentary provided by M. le Chevalier Descamps on Article 15 in his Report.

It is not clear to the best of the present writer's knowledge whether this phrase was ever used prior to the 1899 Hague Convention, and although a number of subsequent arbitration treaties refer to the Convention, only a very few employ the formula "sur la base du respect du droit".⁹⁾

(2) The Statute of the Permanent Court of International Justice

The second major step forward in the history of the systematization of international adjudication is the establishment of the Permanent Court of International Justice and its Statute. Article 38, paragraph 2, of the Statute stipulates:

"This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."¹⁰⁾

As the Court is expected in paragraph 1 of the Article to apply conventional or customary law, or if need be "general principles of law", it is authorized to act on this second basis of decision only when the parties agree to it. The Latin expression of "ex aequo et bono" had been used prior to its incorporation in the Statute,¹¹⁾ but it has been employed far more frequently in the many arbitration clauses subsequent to the Statute.

It is necessary to have a brief look into the legislative history of Article 38, paragraph 2, of the Statute to understand precisely what the Latin phrase means. It seems that a clause providing for equity was originally suggested for inclusion by Mr. Ricci-Busatti, the Italian member, in the Advisory Committee of Jurists that drafted the Statute.¹²⁾ Mr. de Lapradelle, the Rapporteur from France, while admitting that a proposed new Court of Justice should be distinct from the Permanent Court of Arbitration, put his case for a provision of

equity.¹³⁾ The proposition was cautiously supported by Mr. Hagerup, the Norwegian member, who wished to qualify it with a prior authorization by the parties, in recognition of the fact that equity was a very vague concept and that it did not always harmonize with justice.¹⁴⁾ When at a later stage an amended draft article on the applicable law was presented by Mr. Root, the American member,¹⁵⁾ Mr. Ricci-Busatti felt disappointed that principles of equity were not mentioned in it.¹⁶⁾ But he does not seem to have insisted on his proposition, for his later amendment to the proposals jointly presented by the President and Lord Phillimore includes no such reference.¹⁷⁾

The Report prepared by Mr. de Lapradelle and approved unanimously by the Advisory Committee on the last day of its session, while cursorily invoking Article 7 of the abortive convention concerned with the creation of an International Prize Court of 18 October 1907, makes no mention of, nor any reference to, equity in its draft article on the applicable law.¹⁸⁾ Thus the Committee failed to draft a provision for equity during its work on the Statute.

The matter was raised again, however, in the Assembly of the League of Nations. At its 7th meeting on 1 December 1920, the Sub-Committee of the Third Commission of the Assembly found Mr. Fromageot (France) raising the question of widening the wording of draft Article 35 on the applicable law. He suggested adding to No. 3 "the general principles of law and justice",¹⁹⁾ which gave rise to some further discussion. In answer to a question as to the probable consequences of his amendment, Mr. Fromageot explained that its effect would be to enable the Court to state as the sole reason for its judgment that the award had seemed to it to be just. This did not imply that the Court might disregard existing rules of law. After an exchange of some comments on it, the amendment was put to the vote and adopted.²⁰⁾

But at the 10th meeting of the Sub-Committee on 7 December 1920, Mr. Politis (Greece) raised the question as

to whether the text of Article 35, No. 3, as amended and adopted by the Sub-Committee, did actually express the Sub-Committee's opinion on the subject. This opinion was, according to Mr. Politis, that the Court should have the right to apply the general principles of justice only by virtue of an agreement between the parties. He thus proposed to alter the paragraph to read:

"The general principles of law and with the consent of the parties, the general principles of justice recognized by civilized nations."²¹⁾

After some discussion, Mr. Fromageot proposed to meet Mr. Politis' point by adding at the end of Article 35, No. 3, what has turned out to be the present paragraph 2 of Article 38. The Article thus amended was adopted.²²⁾ The Report submitted to the Third Commission by Mr. Hagerup, as President and on behalf of the Sub-Committee, stated that

"La Sous-Commission a ajouté à l'article un nouvel alinéa pour donner à la Cour la faculté de rendre, avec l'agrément des parties, une décision ex aequo et bono."²³⁾

The Report was sent through the Third Commission to the Plenary meeting of the Assembly,²⁴⁾ which finally adopted the Article as amended by Mr. Fromageot and adopted by the Sub-Committee of the Third Commission.²⁵⁾

It may now be asked why and how the formula "general principles of justice" as proposed by Mr. Fromageot, or "principles of equity" as suggested by Mr. Ricci-Busatti, shifted to the Latin phrase "ex aequo et bono". There seems to be no recorded explanation available. Perhaps the members of the Sub-Committee considered these concepts as interchangeable.²⁶⁾ It does not seem, at least, that they made strict distinction between the terms. This could possibly throw light on whether or not there is any distinction between the concepts. Also the fact that Mr. Fromageot's proposal was divided in the end into

"general principles of law recognized by civilized nations" and "ex aequo et bono" may perhaps cast another stream of light on the meaning of "equity".²⁷⁾

At any rate the additional provision was welcomed by some eminent jurists of the day. In the words of Judge Anzilotti, for example, "Tenant compte de certains besoins des rapports internationaux et dans l'intention louable de favoriser le recours à la Cour, ce texte (i.e., Article 38, paragraph 2) permet aux parties d'obtenir une sentence fondée sur l'équité, plutôt que sur le droit stricte"²⁸⁾ Anzilotti's mention of "certains besoins des rapports internationaux" would be worthy of note as a justification of the *raison d'être* of the formula.

(3) The General Act for the Pacific Settlement of International Disputes

The next major multinational attempt to systematize the pacific settlement of disputes is the General Act for the Pacific Settlement of International Disputes of 26 September 1928. Its Article 28 provides for the basis of decision to be applied to the disputes other than those "au sujet desquelles les parties se contesteraient réciproquement un droit" (Article 21) in these words:

"Dans le silence du compromis ou à défaut de compromis, le tribunal appliquera les règles de fond énumérées dans l'article 38 du Statut de la Cour permanente de Justice internationale. En tant qu'il n'existe pas de pareilles règles applicables au différend, le tribunal jugera ex aequo et bono."²⁹⁾

As it is clearly stated here, the rule is that the tribunal should primarily apply "les règles de fond énumérées dans l'article 38 du Statut". But in so far as there exists no such rule applicable to the dispute, "le tribunal jugera ex aequo et bono". In this case there is no need for the parties to agree to authorize the tribunal to decide on this basis. This point, however, gave rise to much

controversy among international lawyers of the day.³⁰⁾

The above provisions afforded a model for the applicable law clause in a great number of general bilateral arbitration treaties from late 1928 into the early 1930s.³¹⁾

2. Restricted Multilateral Treaties

There are some regional multilateral arbitration treaties with a clause providing for equity as the basis of decision. Similar provisions of equity or some reference to the relevant clauses of the multilateral arbitration treaties, global or regional, can be found in several multilateral treaties of a functional character. Also a few multilateral treaties for the settlement of commercial or civil disputes have provisions for equity as the basis of decision.

(1) Regional Arbitration Treaties

a) The Convention Establishing the Central American Court of Justice to Act as a Permanent Court of Arbitration

The Convention to establish the short-lived Central American Court of Justice, signed in Washington on 20 December 1907, by Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador lays down the basis of decision in Article 21:

"In deciding points of fact that may be raised before it, the Central American Court of Justice shall be governed by its free judgment, and with respect to points of law, by the principles of international law"³²⁾

Thus, although restricted in the decision of points of fact, the Court must exercise "free judgment". This can be understood to involve weighing the relevant circumstances

of a given case, and is an instance of equitable consideration.

b) The Treaty of Conciliation and Arbitration between Estonia, Finland, Latvia and Poland

In this treaty between four Baltic countries, signed at Helsingfors on 17 January 1925, there is no clause expressly laying down the applicable law. But with respect to the arbitral procedure Article 20 provides:

"... A défaut de clauses compromissoires contraires, [les Parties en litige] se conformeront pour tout ce qui concerne la procédure arbitrale aux dispositions établies par la Convention, signée à La Haye le 19 octobre 1907 pour le règlement pacifique des conflits internationaux, y compris les articles 53 et 54 et tenant compte de l'article 83 de ladite Convention."³³⁾

Admittedly the reference is to the "dispositions établies par la Convention" "pour tout ce qui concerne la procédure arbitrale", but inasmuch as the Convention has established arbitration as a procedure to decide "sur la base du respect du droit", rather than "sur la base du droit", the reference could perhaps be said to involve that to the basis of decision laid down in its Article 37.

c) Little Entente: General Act of Conciliation, Arbitration and Judicial Settlement

This arbitration treaty between Roumania, the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia, signed in Belgrade on 21 May 1929, has the following clause stipulating the basis of decision for arbitration:

"Article 31: Dans le silence du compromis ou à défaut de compromis, le Tribunal appliquera les règles énumérées dans l'article 38 du Statut de la Cour

permanente de Justice internationale. En tant qu'il n'existe pas de pareilles règles applicables au différend, le Tribunal jugera ex aequo et bono."34)

This is identical with the wording of Article 28 of the General Act for the Pacific Settlement of International Disputes of 1928.

d) The American Treaty on Pacific Settlement
(Pact of Bogotá)

The inter-American arbitration treaty of 30 April 1948, Article 36, provides for the basis of decision in judicial settlement in these words:

"In the case of controversies submitted to the judicial procedure to which the Treaty refers, the decision shall devolve upon the full Court, or, if the parties so request, upon a special chamber in conformity with Article 26 of the Statute of the [International Court of Justice]. The parties may agree, moreover, to have the controversy decided ex aequo et bono."35)

For our purposes this Article has no new element to add to Article 38, paragraph 2, of the Statute. What may be of interest, however, is that no reference is made in the provisions on the "Procedure of Arbitration" in Articles 38 to 49 to the basis of decision or applicable law.

e) The European Convention for the Peaceful
Settlement of Disputes

Article 26 of this regional arbitration treaty of 29 April 1957 provides for the basis of decision in these terms:

"If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal

shall decide ex aequo et bono, having regard to the general principles of international law, while respecting the contractual obligations and the final decisions of international tribunals which are binding on the parties."³⁶⁾

The Tribunal's decision ex aequo et bono is qualified, first, by the lack of a special agreement or non-existence of rules of applicable law in the special agreement. The further requirement is that international law and the other relevant legal factors must be taken into account. Put in a simplified way, this is a provision of law and equity.

f) The Protocol to the Charter of the Organization of African Unity

Pursuant to Article 19 of the Charter of the Organization of African Unity of 1963, a Protocol was signed in Cairo on 21 July 1964 to establish the Commission of Mediation, Conciliation and Arbitration. Article 30 reads:

"In the absence of any provision in the compromis regarding the applicable law, the Arbitral Tribunal shall decide the dispute according to treaties concluded between the parties, International Law, the Charter of the United Nations, and, if the parties agree, ex aequo et bono."³⁷⁾

In so far as equity is concerned, there is nothing new in this stipulation.

g) The Final Act of the Conference on Security and Co-operation in Europe

The Final Act of the Conference on Security and Co-operation in Europe, adopted in Helsinki on 1 August 1975, deals with "Questions relating to Security in Europe", wherein "1. (a) Declaration on Principles Guiding Relations

between Participating States" has a provision on "V. Peaceful settlement of disputes":

"[The participating States] will endeavour in good faith and a spirit of co-operation to reach a rapid and equitable solution on the basis of international law."³⁸⁾

To the extent that the solution envisaged is an equitable one, it could be reached with equitable considerations in the application of international law.

h) The Statute of the Court of Justice of the Cartagena Agreement

By decision 184 adopted at its 37th Extraordinary Session, Quito, 18-19 August 1983, the Commission of the Cartagena Agreement drew up the Statute of the Court of Justice. But it has no express basis of decision, except that in Article 56 it stipulates:

"The judgment must contain:

...

f) The considerations or elements on which the judgment is based; ..."³⁹⁾

In so far as it is not strictly obligated to base its judgment on law, the Court could give equitable considerations in its decision of cases brought before it.

(2) Treaties of a Functional Character

a) The Statute on Freedom of Transit

In the Statute on Freedom of Transit, an integral part of the Convention on Freedom of Transit signed in Barcelona on 20 April 1921, Article 13 provides in part for the settlement of disputes in these terms:

"In order to settle such disputes [as may arise as to the interpretation or application of this Statute], however, in a friendly way as far as possible, the Contracting States undertake, before resorting to any judicial proceedings and without prejudice to the powers and right of action of the Council and Assembly, to submit such disputes for an opinion to any body established by the League of Nations, as the advisory and technical organization of the Members of the League in matters of communications and transit. ..."⁴⁰⁾

This clause has no express provision for the basis of decision, but in so far as it refers to the intention of settling disputes "in a friendly way as far as possible" by an advisory and technical body set up by the League of Nations, the "opinion" of such a body could possibly involve considerations of equity.

An identical wording can be found in Article 22 of the Statute on the Regime of Navigable Waterways of International Concern which forms an integral part of the Convention on the Regime of Navigable Waterways of International Concern signed in Barcelona on 20 April 1921.⁴¹⁾

b) The Slave Convention

In this multilateral slave convention of 25 September 1926, which was later amended by a Protocol of 7 December 1953 opened for signature and acceptance at the Headquarters of the United Nations, Article 8 provides for three alternative adjudicatory organs to one of which the dispute relating to the interpretation or application of this Convention should be submitted:

"... In case either or both of the States Parties to such a dispute should not be parties to the Protocol of December 16th, 1920, relating to the Permanent Court of International Justice, the dispute shall be

referred, at the choice of the Parties and in accordance with the constitutional procedure of each State, either to the Permanent Court of International Justice or to a court of arbitration constituted in accordance with the Convention of October 18th, 1907 for the Pacific Settlement of International Disputes or to some other court of arbitration."⁴²⁾

Herein is no express reference to the basis of decision. But if the dispute is submitted to a court of arbitration constituted in accordance with the Hague Convention, the basis of decision of "respect du droit" will come into play unless the compromis provides otherwise. In this sense considerations of equity have a possibility, if remote, of application.

c) The Treaty Establishing the European Coal and Steel Community

The Treaty Establishing the European Coal and Steel Community of 18 April 1951 provides that the High Authority takes measures to ensure "une équitable réparation" if its decisions or recommendations are declared by the Court of Justice void and referred back to it. Article 34 runs:

"En cas d'annulation, la Cour renvoie l'Affaire devant la Haute Autorité. Celle-ci est tenue de prendre les mesures que comporte l'exécution de la décision d'annulation. En cas de préjudice direct et spécial subi par une entreprise ou un groupe d'entreprises du fait d'une décision ou d'une recommandation reconnue par la Cour entachée d'une faute de nature à engager la responsabilité de la Communauté, la Haute Autorité est tenue de prendre, en usant des pouvoirs qui lui sont reconnus par les dispositions du présent Traité, les mesures propres à assurer une équitable réparation du préjudice résultant directement de la décision ou de la recommandation annulée et d'accorder, en tant que de

besoin, une juste indemnité.

Si la Haute Autorité s'abstient de prendre dans un délai raisonnable les mesures que comporte l'exécution d'une décision d'annulation, un recours en indemnité est ouvert devant la Cour."⁴³⁾

d) The European Fisheries Convention

Annex II (Arbitration) of the thirteen-nation European Fisheries Convention of 9 March 1964 provides for a compensation of a secondary order in its Article 12:

"If the execution of an award or the Arbitral Tribunal would conflict with a judgment or measure enjoined by a court of law or other authority of one of the parties to the dispute, and if the municipal law of that party does not permit, or only partially permits, the consequences of the judgment or measure in question to be annulled, the Arbitral Tribunal shall, if necessary, grant the injured party equitable satisfaction."⁴⁴⁾

As is clear from the wording, the provisions are concerned with a possibly necessary compensation in the event of a conflict between an award and a domestic law measure. Within that framework it is an equitable consideration.

e) The BENELUX Protocol concerning the Co-ordination of Economic and Social Policies

The Protocol, drawn up at The Hague on 24 July 1953, Article 8, paragraph 5, provides:

"Les arbitres se prononceront en amiables compositeurs dans l'esprit des accords conclus par les trois Gouvernements."⁴⁵⁾

As the somewhat old-fashioned expression of "amiable compositeur" implies, the arbitrators would be authorized

to give considerations of equity provided they act within the spirit of agreements between the three Governments.

f) The Treaty Instituting the BENELUX Economic Union

The Treaty of 3 February 1958 to set up an economic union among the Benelux countries, in its Article 45, provides for the basis of decision of disputes:

"1. Le Collège arbitral statue sur la base du respect du droit. Avant de rendre sa sentence, il peut, dans tout état du litige, proposer à l'agrément des parties un règlement à l'amiable du différend.

2. Si les parties sont d'accord, le Collège arbitral statue ex aequo et bono."⁴⁶⁾

Interpreted literally, the primary basis of decision of "respect du droit" would seem to be provided here as opposed to "un règlement à l'amiable" and "ex aequo et bono". If this is tenable, the possible elements of equity in the former phrase, as we have seen above in the analysis of the Hague Convention for the Pacific Settlement of International Disputes, are different from those in the latter phrases. The official English translation provided by the United Nations Secretariat for the authentic French text's "sur la base du respect du droit" is "on the rule of law",⁴⁷⁾ which gives the impression that there is a gap between the text and the translation. Unless the translation is wrong, the phrase "the rule of law" should have the notion of not only "law" but also "respect for law", which is of a broader scope.

g) The Act regarding Navigation and Economic Co-operation between the States of the Niger Basin

Article 7 of the nine nation agreement of 26 October 1963 for functional purposes provides for the method of settling disputes arising out of the interpretation or application of the agreement:

"Tout différend qui pourrait surgir entre les Etats riverains relativement à l'interprétation ou à l'application du présent Acte sera réglé entre eux à l'amiable ou par l'intermédiaire de l'organisme inter-gouvernemental prévu au articles 5 et 6 ci-dessus. À défaut d'un tel règlement le différend sera tranché par voie d'arbitrage et notamment par la Commission de Médiation, de Conciliation et d'Arbitrage de l'organisation de l'Unité Africaine, ou par voie de règlement judiciaire par la Cour internationale de Justice."⁴⁸⁾

In so far as the use of the OAU Commission is envisaged as one of the alternative means of settlement when negotiations or the intergovernmental organ has failed to settle the dispute, there is a possibility that the parties may agree to have the Commission decide ex aequo et bono.

h) The European Convention for the Protection of Animals during International Transport

In this multilateral functional treaty of 13 December 1968, Chapter VII (Settlement of Disputes), Article 47 (sole article), paragraph 3, has this to say:

"The arbitration tribunal shall lay down its own procedure. Its decisions shall be taken by majority vote. Its award which shall be based on this Convention shall be final."⁴⁹⁾

The award is to be based on this Convention, which, however, gives no express basis of decision. But inasmuch as the tribunal is authorized to lay down its rules of procedure, it has latitude to prescribe equitable rules. It is difficult to deny the tribunal the same latitude to give equitable consideration for a case before it.

i) The International Convention on the Elimination of All Forms of Racial Discrimination

The Convention, adopted by the General Assembly of the United Nations on 21 December 1965 and opened for signature on 7 March 1966, provides for an "amicable solution" of the dispute by an ad hoc Conciliation Commission of five members. Article 13, paragraph 1, lays down:

"When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute."⁵⁰⁾

A similar solution of the dispute is provided for in the American Convention on Human Rights of 22 November 1969. Article 48, paragraph 1 (f), provides:

"The Commission (= the Inter-American Commission on Human Rights) shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention."⁵¹⁾

j) The United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea, opened for signature on 10 December 1982, has a number of equitable provisions for the settlement of disputes. Article 59 provides for the settlement of disputes in the exclusive economic zone:

"In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to

other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."⁵²⁾

Here an express reference to equity is made along with equitable considerations to be given to "all the relevant circumstances" and "the respective importance of the interests involved to the parties as well as to the international community as a whole."

"Equitable arrangements" must be made for the sake of land-locked States in the exploitation of the living resources in the exclusive economic zone, as is provided in Article 69, paragraph 3:

"When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall co-operate in the establishment of equitable arrangements on a bilateral, sub-regional or regional basis to allow for participation of developing land-locked States of the same sub-region or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the sub-region or region, as may be appropriate in the circumstances and on terms satisfactory to all parties. ..."⁵³⁾

Another "equitable solution" formula is contained in the provisions for the delimitation of the exclusive economic zone and the continental shelf in Articles 74 and 83, paragraph 1:

"The delimitation of the exclusive economic zone/

continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."⁵⁴⁾

An "amicable settlement" provision, if not precisely the same as the "equitable solution", is in Article 5 of Annex V, which is devoted to the procedure of conciliation:

"The commission may draw the attention of the parties to any measure which might facilitate an amicable settlement of the disputes."⁵⁵⁾

Article 293 on the applicable law, after mentioning "this Convention and other rules of international law not incompatible with this Convention", makes mention of the ex aequo et bono decision:

"Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree."⁵⁶⁾

(3) Treaties for the Settlement of Commercial or Civil Disputes

a) The European Convention on International Commercial Arbitration

Article 7 of the Convention, signed at Geneva on 21 April 1961, provides a basis for decision in these words:

"1. The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule

of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.

2. The arbitrators shall act as amiable compositeurs if the parties so decide and if they may do so under the law applicable to the arbitration."⁵⁷⁾

In paragraph 1 "the proper law under the rule of conflict that the arbitrators deem applicable" could involve principles of equity. The text of paragraph 2 needs no explanation.

b) The Convention on the Settlement of Investment Disputes between States and Nationals of Other States

The multilateral treaty for the settlement of investment disputes of 18 March 1965 has provisions for the basis of decision in Article 42, which runs:

"1. The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

2. The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

3. The provisions of paragraphs 1 and 2 shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree."⁵⁸⁾

What is interesting in this Article is paragraph 2, where specific reference is made to the obligation of the Tribunal to avoid a finding of non liquet. Silence or obscurity of the law does not justify it. This may be interpreted to imply the necessity for the Tribunal to

decide on the basis of equity or "general principles of law recognized by civilized nations" to avoid such a finding. For when a tribunal finds itself in a situation in which it is unable to find the law applicable to the case before it and yet it is not allowed to pronounce a non liquet, the logical consequence is that it should have some discretion or latitude in order to fulfil its function. The discretion, by implication, involves resort to equity in such a dilemma.

c) The Convention on Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Co-operation

In this rare dispute settlement treaty between eight East European countries, signed in Moscow on 26 May 1972, a general provision is given in Article 1, paragraph 1, which reads:

"All disputes between economic organizations resulting from contractual and other civil law cases arising between them in the course of economic, scientific and technical co-operation of the countries-parties to the present Convention shall be subject to arbitration proceedings with the exclusion of the above disputes from jurisdiction of the courts of law."⁵⁹⁾

Here "arbitration proceedings" is clearly distinguished from "jurisdiction of the courts of law", and would imply a procedure that does not apply strict law but may mitigate it or give equitable considerations to the relevant circumstances of the case concerned.

d) The UNCITRAL Model Law on International Commercial Arbitration

The Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985 provides "rules

applicable to substance of dispute" in Article 28:

"(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."⁶⁰⁾

Similar provisions can be seen in the International Energy Agency's Dispute Settlement Centre Procedures for Arbitration and Additional Rules of 10 November 1981.⁶¹⁾

3. Bilateral Treaties

There are a great number of bilateral arbitration treaties or treaties for the pacific settlement of international disputes dating from the mid-nineteenth century. These normally have a clause or clauses providing for the basis of decision in one way or another. Many of them have express or implicit reference to equity or equitable considerations. Besides such arbitration treaties, there are a variety of bilateral treaties for some specific functional purposes, which in most cases have provisions for the pacific settlement of disputes. Among these are clauses stipulating the basis of decision in

terms of equity or equitable considerations.

In this section such collected clauses will be grouped by the phrases used therein, in order to show what expressions are employed for equitable bases of decision. This in turn would help hopefully to elucidate the meaning of equity from the way it is used in treaty clauses. On the other hand, this mode of analysis would also reveal that certain States prefer certain phrases of equity, rather than others, for the settlement of certain kinds of disputes.

(1) General Arbitration Treaties

1) "ex aequo et bono"

a) "ex aequo et bono"

Article 17 of the Treaty of Conciliation and Arbitration of 30 April 1926 between Belgium and Sweden, which provides for the decision of all questions other than those "with regard to which the Parties are in conflict as to their respective rights", runs in part:

"Le tribunal statuera ex aequo et bono".⁶²⁾

Put simply, the provision is complete in itself. But it is well to bear in mind that the "tribunal" is an arbitral tribunal constituted, in the absence of any compromis between the Parties, in accordance with the provisions of Article 45 of the 1907 Hague Convention for the Pacific Settlement of International Disputes, at the request of either Party when the Parties have not reached agreement within one month of the termination of the proceedings of the Permanent Conciliation Commission. This seems partly to explain the latitude of the tribunal to decide ex aequo et bono, which is re-inforced by the sentence immediately preceding the above-mentioned sentence:

"Toutefois, si dans un délai de six mois à date du

jour où l'une des Parties aura adressé à l'autre une demande tendant à soumettre le différend à l'arbitrage, le compromis visé par la dite Convention de La Haye n'a pas été signé, il sera établi, à la demande de l'une des Parties, par le tribunal arbitral."⁶²⁾

An identical wording for the basis of decision can be found in a few other arbitration treaties between Belgium and Sweden on the one hand and other European States.⁶³⁾ More or less immediate qualifications for the phrase "ex aequo et bono" are included in the examples of clauses that follow.

- b) "according to the principles of international law, or ex aequo et bono"

In the Argentina-Brazil General Arbitration Treaty of 7 September 1905, the arbitrator or the arbitral tribunal has the choice to base his or its decision on law or alternatively decide ex aequo et bono under Article 10, which runs as follows:

"The arbitrator or the arbitral tribunal shall be obliged to decide according to the principles of international law, following the special rules which the two parties may have established, or ex aequo et bono, in accordance with the powers that may have been conferred upon them by the agreement."⁶⁴⁾

- c) "a tribunal having authority to decide ex aequo et bono"

The France-Sweden Treaty of Conciliation, Judicial Settlement and Arbitration of 3 March 1928 in its Article 16 provides for the basis of decision in these terms:

"Les différends autres que les litiges [ayant pour objet un droit allégué par une des Parties et contesté

par l'autre...] seront, à défaut de conciliation, soumis à un Tribunal arbitral ayant le pouvoir de statuer ex aequo et bono."65)

- d) "a tribunal having power to decide ex aequo et bono, provided that a rule of international law cannot be applied"

Article 19 of the Spain-Turkey Treaty of Conciliation, Judicial Settlement and Arbitration of 28 April 1930 provides for the decision ex aequo et bono on the condition that there exists no rule of international law applicable to the dispute:

"In the event of failure to reach an agreement between the Parties, the dispute shall, at the request of either Party, be submitted for decision to an Arbitral Tribunal having power to decide ex aequo et bono provided that a rule of international law cannot be applied."66)

- e) "ex aequo et bono if there exist no such substantive rules applicable as those of Article 38 of the Statute of the Permanent Court of International Justice"

In much the same wording as Article 28 of the General Act for the Pacific Settlement of International Disputes of 1928, Article 29, paragraph (d), of the Pact of Friendship, Conciliation and Judicial Settlement of 27 March 1929 between Greece and the Kingdom of the Serbs, Croats and Slovenes lays down the basis of decision:

"... Dans le silence du compromis, le Tribunal appliquera les règles de fond énumérées dans l'article 38 du Statut de la Cour permanente de Justice internationale. En tant qu'il n'existe pas de pareilles règles applicables au différend, le Tribunal jugera ex aequo et bono."67)

Among the many clauses in identical or much the same wording as the above,⁶⁸⁾ it is interesting to note that Article 31 of the Denmark-Yugoslavia Treaty of Conciliation, Arbitration and Judicial Settlement of 14 December 1935 has an additional phrase of "si les deux Parties sont d'accord" in the second sentence thus:

"... le tribunal jugera, si les deux Parties sont d'accord, ex aequo et bono."⁶⁹⁾

This is a cautious wording in view of the controversy which arose out of the lack of that very phrase in Article 28 of the General Act of 1928.⁷⁰⁾ But one may well wonder why neither Denmark nor Yugoslavia added this phrase in their other treaties of arbitration.

f) "ex aequo et bono if there are no rules of international law applicable"

Article 31 of the Belgium-Turkey Convention of Conciliation, Arbitration and Judicial Settlement of 8 April 1931 has a slightly different wording from that of Article 28 of the General Act of 1928:

"Dans le silence du compromis ou à défaut de compromis, le tribunal appliquera les règles du droit international. En tant qu'il n'existe pas de pareilles règles applicables au différend, le tribunal jugera ex aequo et bono."⁷¹⁾

g) "If the dispute is not of a juridical nature in the opinion of the Court, the Parties agree to its being settled ex aequo et bono."

The Italy-Switzerland Treaty of Conciliation and Judicial Settlement of 20 September 1924, which afforded a model for the subsequent bilateral and multilateral treaties for the pacific settlement of international disputes, provides in its Article 15 for the basis of decision in the following words:

"Si l'une des Parties n'accepte pas les propositions de la Commission permanente de conciliation ou ne se prononce pas dans le délai fixé par son rapport, chacune d'elles pourra demander que le litige soit soumis à la Cour permanente de Justice internationale.

Dans le cas où, de l'avis de la Cour, le litige ne serait pas d'ordre juridique, les Parties conviendront qu'il sera tranché ex aequo et bono."72)

The second paragraph is important in that the Court is empowered to judge whether the dispute submitted to it is legal in nature, and that the non-legal dispute, if so found by the Court, is to be decided ex aequo et bono, thus linking non-legal disputes with a decision ex aequo et bono.

Article 18 of the Luxembourg-Poland Treaty of Conciliation and Arbitration of 29 October 1928 supplies a variant of the above provisions of Article 15 of the Italian-Swiss Treaty by adding an "arbitral tribunal" to the Permanent Court of International Justice to make the relevant phrase read "de l'avis de la Cour ou du Tribunal arbitral."73) A further variant is afforded by Article 26, paragraph 2, of the Bulgaria-Turkey Treaty of Neutrality, Conciliation, Judicial Settlement and Arbitration of 6 March 1929, which makes the Court's decision ex aequo et bono contingent on "en tant qu'il n'existe pas aucune règle du droit international applicable au différend".74)

- h) "arbitration, but the right reserved to submit the case to the Permanent Court of International Justice which decides ex aequo et bono"

Disputes of a non-judicial nature, after an attempt for conciliation, are to be submitted to an arbitral tribunal but may alternatively be submitted to the Permanent Court of International Justice under Article 17 of the Belgium-Portugal Treaty of Conciliation, Judicial Settlement and Arbitration of 9 July 1927:

"Si les Parties ne peuvent être conciliées, le litige sera, à la requête d'une seule des Parties, soumis pour décision à un tribunal arbitral constitué dans les conditions et suivant la procédure prévues par la Convention de La Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux.

Les Parties se réservent, toutefois, la faculté de soumettre le litige, d'un commun accord, à la Cour permanente de Justice internationale, laquelle statuera ex aequo et bono." ⁷⁵⁾

- i) "non-legal disputes to be submitted to the Permanent Court of International Justice, which decides ex aequo et bono if there is no rule of law applicable"

In the Finnish-Swiss Treaty of Conciliation and Judicial Settlement of 16 November 1927, Article 15 provides in part:

"Les Parties conviennent, en outre, que, dans le cas où le litige ne rentrerait pas dans l'une des quatre catégories de différends d'ordre juridique énumérées à l'article 36, alinéa 2, du Statut de la Cour de Justice, chacune d'entre elles pourra néanmoins demander qu'il soit déféré à la Cour permanente de Justice internationale, qui le tranchera ex aequo et bono dans la mesure où il n'existe pas de règle de droit applicable." ⁷⁶⁾

Here the determination of whether a given dispute falls under the category of those in Article 36, paragraph 2, of the Statute is to be made by the parties, but such determination is made by the Permanent Court under Article 23 of the Persian-Turkish Treaty of Conciliation, Judicial Settlement and Arbitration of 23 January 1932. ⁷⁷⁾

- j) "non-legal disputes may be submitted to the International Court of Justice, which may decide ex aequo et bono if the parties so agree"

In a recent Treaty for Conciliation, Judicial Settlement and Arbitration of 7 July 1965 between the United Kingdom and Switzerland, Article 14 (of Chapter III: Judicial Settlement) provides in part:

"(3) By special agreement between the Contracting Parties, disputes other than those mentioned in paragraph (1) of this Article (i.e., the four categories of disputes in Article 36, paragraph 2, of the Statute) may also be submitted to the Court. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the Contracting Parties so agree."⁷⁸⁾

- 2) "the powers of an amiable compositeur"

In a series of arbitration treaties concluded by Spain with some European States and a couple of such treaties of Norway with European States, a clause is provided for an arbitral tribunal to have the powers of an amiable compositeur. Thus Article 19 of the Belgo-Spanish Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927 runs:

"Si les Parties ne peuvent être conciliées, le conflit sera, à la requête d'une seule des Parties, soumis pour décision à un tribunal arbitral, qui, à défaut d'autre accord entre les Parties, sera composé de cinq membres désignés pour chaque cas particulier, suivant la méthode prévue ... en ce qui concerne la Commission de Conciliation. Ce tribunal arbitral aura, en pareil cas, les pouvoirs d'amiable compositeur et dictera un règlement obligatoire pour les Parties."⁷⁹⁾

A variation of the clause quoted above, which can be found in Article 18, paragraph 2, of the Luxembourg-Norway Treaty of Conciliation, Arbitration and Judicial Settlement of 12 February 1932, reads:

"Dans le cas où, de l'avis de la [Cour permanente de Justice internationale] ou du Tribunal arbitral, le différend ne serait pas d'ordre juridique, la Cour ou le Tribunal auront les pouvoirs d'amiables compositeurs et dicteront un règlement obligatoire pour les Parties, ..."80)

This is instructive in that it substitutes "les pouvoirs d'amiables compositeurs" for "le pouvoir de statuer ex aequo et bono" as found in, for example, Article 16 of the 1928 Franco-Swedish arbitration treaty as seen above in sub-section 1) - c). From this it would be safe to say that here at least, the phrases of "les pouvoirs d'amiable compositeur" and "le pouvoir de statuer ex aequo et bono" are perhaps thought to be interchangeable. This reasoning may be re-inforced by Articles 19 and 20 of the Spanish-Greek Treaty of Conciliation, Judicial Settlement and Arbitration of 23 January 1930, which provide that an arbitral tribunal having "les pouvoirs d'amiable compositeur" under Article 19 "jugera ex aequo et bono", in so far as there is no such substantive rule as enumerated in Article 38 of the Statute of the Permanent Court of International Justice, under Article 20.⁸¹⁾

- 3) "Unless the compromis imposes the application of special rules or authorizes the arbitrator to decide as an amiable compositeur, he must apply the principles of international law"

In some arbitration treaties between several South American States, a clause is incorporated providing that the arbitrator should decide according to general international law unless he is instructed to apply special rules or authorized to act as an amiable compositeur. Thus Article 6 of the Brazil-Chile Arbitration Treaty of 18 May

1899 runs as follows:

"The arbitrator is competent to decide on the validity of the compromise and on its interpretation. He must decide according to the principles of international law, provided that the compromise does not impose the application of special rules or does not authorize the arbitrator to decide as friendly arbitrator."⁸²⁾

4) "on the basis of claims of the parties in the absence of a compromis"

A somewhat ambiguous basis of decision, the claims of the parties, is provided in Article 2 of the Denmark-Italy Convention d'arbitrage obligatoire of 16 December 1905, which reads in part:

"A défaut d'un compromis spécial, les arbitres jugeront sur la base des prétentions formulées par les deux Parties."⁸³⁾

This may be said to be a truism, because without a compromis, the arbitrators would be left without an express basis of decision, and consequently would have no other choice than to rest their judgment on the claims of the parties and the evidence presented in support thereof. But the provision is significant since it is an express statement of a basis of decision which could involve considerations of equity.

5) "in accordance with the principles of justice and equity"

Article 2 of the Finland-Iceland Convention regarding the Pacific Settlement of Disputes of 27 June 1930, after providing for the submission of the disputes to arbitration following the procedure of investigation and conciliation, provides in part:

"The Parties agree that the dispute referred to in the present Article shall be settled in accordance with the principles of justice and equity."⁸⁴⁾

- 6) "in accordance with considerations of equity, if the parties agree"

In a series of arbitration treaties between Germany and her neighbouring States during the 1920s, it was provided that the parties could agree to authorize the tribunal to give an award in accordance with considerations of equity, rather than legal principles. Article 5 of the German-Swiss Treaty of Conciliation, Arbitration and Judicial Settlement of 3 December 1921, for example, provides in part:

"If the Parties agree, the Tribunal may, instead of basing its decision on legal principles, give an award in accordance with considerations of equity."⁸⁵⁾

This sentence comes after the provision that the tribunal must apply first the relevant treaties, secondly customary law, and thirdly general principles of law.

- 7) "in accordance with the principles of law and equity"

In some arbitration treaties between the Nordic States, a clause is included to provide that non-legal disputes should be settled according to the principles of law and equity. Thus the Norway-Sweden Convention for the Pacific Settlement of Disputes of 25 November 1925 has these provisions in its Article 2:

"The Contracting Parties undertake to submit to arbitration, in accordance with the ensuing provisions, all disputes other than those [which fall within one of the categories specified in Article 36, paragraph 2, of the Statute of the Permanent Court of

International Justice], provided that they have first been subjected to the procedure of enquiry and conciliation ... and that it has not been possible to settle them by this means.

The Parties agree that the disputes referred to in the present Article shall be settled in accordance with the principles of law and equity."⁸⁶⁾

- 8) "differences which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity"

In the arbitration treaties of the late 1920s concluded by the United States with the European and a few Afro-Asian States, a clause linked legal disputes with the application of principles of law or equity. Thus Article 2 of the United States-France Treaty of Arbitration of 6 February 1928 provides:

"All differences relating to international matters in which the High Contracting Parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy, which have not been adjusted as a result of reference to the above-mentioned Permanent International Commission, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration ... or to some other competent tribunal, as shall be decided in each case by special agreement"⁸⁷⁾

Admittedly this is not an express basis of decision, but refers to "law or equity" only in so far as it concerns the justiciability of disputes. It would be fair to surmise, however, that inasmuch as disputes are deemed to be susceptible of decision on the basis of law or equity, the tribunal will accordingly base its decision on the principles of law or equity.

9) "Permanent Court of Arbitration unless otherwise agreed"

Article 7 of the United States-Switzerland Treaty of Arbitration and Conciliation of 16 February 1931 provides for the method to determine the tribunal:

"The tribunal to which juridical differences shall be submitted shall be determined in each case by the Contracting Parties but shall, in the absence of other agreements, be the Permanent Court of Arbitration established at The Hague by the Convention for the Pacific Settlement of International Disputes concluded October 18, 1907. Decision as to the tribunal shall be made in each case by a special agreement, which special agreement shall ... define its (i.e., the tribunal's) powers"⁸⁸⁾

It is needless to say that if the dispute is submitted to the Permanent Court of Arbitration, the basis of decision will be "respect for law" unless otherwise laid down in specific terms by the compromis.

10) "an arbitral tribunal in accordance with the Hague Convention for the Pacific Settlement of International Disputes"

Article 16 of the Czechoslovak-Swedish Treaty of Conciliation and Arbitration of 2 January 1926, providing in paragraphs 1 and 2 that the dispute should or may be submitted to the Permanent Court of International Justice by a compromis or by application in the absence of a compromis in the event of no amicable agreement being reached before the Permanent Conciliation Commission, stipulates the alternative means of submitting the dispute to an arbitral tribunal in paragraph 3:

"La disposition de cet article ne porte pas atteinte à la faculté des Parties de soumettre la contestation, par voie de compromis, à un tribunal

arbitral dans les conditions et suivant la procédure prévues par la Convention de La Haya du 18 octobre 1907 pour le règlement pacifique des conflits internationaux."⁸⁹⁾

When a dispute is submitted to an arbitral tribunal as is provided in this clause it is logical to assume that the tribunal will decide "on the basis of respect for law" unless any other specific basis of decision is indicated in the compromis.

Provisions to the same effect, although in different wordings, can be found in a number of arbitration treaties concluded during the late 1920s and the early 1930s.⁹⁰⁾

- 11) "the Permanent Court of International Justice in accordance with its Statute or an arbitral tribunal according to the Hague Convention"

Article 16 of the Germany-Belgium Arbitration Treaty of 16 October 1925 provides in part:

"A défaut de conciliation devant la Commission permanente de conciliation, la contestation sera soumise par voie de compromis soit à la Cour permanente de Justice internationale dans les conditions et suivant la procédure prévues par son statut, soit à un tribunal arbitral dans les conditions et suivant la procédure prévues par la Convention de La Haya du 18 octobre 1907 pour le règlement pacifique des conflits internationaux."⁹¹⁾

Some arbitration treaties of the late 1920s and the early 1930s have clauses with identical wording.⁹²⁾

A slightly different wording is used to give provisions to the same effect in some other treaties of arbitration during the same period. Article 4 of the France-Netherlands Treaty of 10 March 1928, for example, runs in these words:

"Si, dans le cas d'un des litiges [de quelque nature qu'ils soient, ayant pour objet un droit allégué par une des Hautes Parties contractantes et contesté par l'autre], les deux Parties n'ont pas eu recours à la Commission permanente de Conciliation ou si celle-ci n'a pas réussi à concilier les Parties, le litige sera soumis d'un commun accord par voie de compromis soit à la Cour de Justice internationale qui statuera dans les conditions et suivant la procédure prévues par son statut, soit à un tribunal arbitral qui statuera dans les conditions et suivant la procédure prévues par la Convention de La Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux."⁹³⁾

12) "provisions of the Hague Convention in the absence of particulars in the compromis"

Article 27 of the Norway-Poland Treaty of Conciliation, Arbitration and Judicial Settlement of 9 September 1929 makes indirect reference to the basis of decision in these words:

"A défaut d'indications ou de précisions suffisantes dans le compromis, relativement aux points indiqués dans l'article précédent, il sera fait application, dans la mesure nécessaire, des dispositions de la Convention de La Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux."⁹⁴⁾

13) "Article 38 of the Statute to be applied by the arbitral tribunal"

Non-legal disputes are to be submitted to an arbitral tribunal which will mutatis mutandis apply the rules of Article 38 of the Statute of the Permanent Court of International Justice under Article 2 of the Finnish-Norwegian Convention for the Pacific Settlement of Disputes of 3 February 1926. The Article runs:

"Les Parties Contractantes s'engagent à soumettre à la procédure d'arbitrage, conformément aux dispositions ci-après, tous différends qui ne sont pas d'ordre juridique et qui n'auront pu être réglés par la voie diplomatique, toutefois seulement après qu'ils auront été soumis, sans avoir pu être réglés par cette voie, à la procédure d'enquête et de conciliation prévue dans la Convention du 27 juin 1924, concernant l'institution d'une Commission permanente d'enquête et de conciliation.

Les règles de l'article 38 du Statut de la Cour permanente de Justice internationale trouveront l'application correspondante dans les décisions du tribunal arbitral."⁹⁵⁾

In so far as the "règles de l'article 38 du Statut" are to be applied, its second paragraph providing for ex aequo et bono decision could not be excluded from application.

14) "equitable compensation for consequences of a domestic judicial measure"

An equitable consideration, of the nature of compensation provided in the European Fisheries Convention of 1964, is provided in clauses in a number of arbitration treaties during the inter-war years. Thus Article 16 of the Hungary-Switzerland Treaty of Conciliation and Arbitration of 18 June 1924 provides in these words:

"Si le tribunal établissait qu'une décision d'une instance judiciaire du toute autre autorité relevant de l'une des Parties contractantes se trouve entièrement ou partiellement en opposition avec le droit des gens et si le droit constitutionnel de cette Partie ne permet pas ou ne permet qu'imparfaitement d'effacer par voie administrative les conséquences de la décision en cause, il serait accordé à la Partie lésée une satisfaction équitable d'une autre ordre."⁹⁶⁾

(2) Treaties of a Functional Character

In arbitration clauses of treaties of a functional character, there are some different bases of decision provided from those in general arbitration treaties which have been glanced at above. It could be understood as showing that treaties concluded for some specific functional purposes are limited in their scope of application, with disputes arising therefrom being accordingly limited, and consequently that their bases of decision in the dispute settlement provisions could naturally differ from those in general arbitration treaties. While, as will be seen below, this seems true in a limited number of arbitration clauses of functional treaties, it would be worthy of note as indicating a possible link between certain disputes of specific kinds and the basis of decision in the procedure of settlement of those disputes.

1) "on the basis of respect for law"

In a recent series of capital investment/economic co-operation treaties between one or two of the Benelux countries and a few African countries, it is laid down that the tribunal shall decide primarily on the basis of respect for law. Thus under Article 4 of the Netherlands-Tunisia Convention concerning the encouragement of capital investment and the protection of property of 23 May 1963:

"... Le tribunal statue sur la base du respect du droit. Avant de rendre sa sentence, il peut, dans tout état du litige, proposer à l'agrément des Parties un règlement à l'amiable du différend.

Si les Parties sont d'accord, le tribunal statue ex aequo et bono."⁹⁷⁾

These provisions as a whole would suggest an amicable settlement of disputes involving equitable considerations for the parties concerned, rather than a settlement based

on strictly legal considerations.

A similar provision is included, although indirectly, in the Agreement between the Philippines and the Asian Development Bank of 22 December 1966 regarding the Headquarters of the Bank. Article XIV, "Settlement of Disputes", Section 53 which provides for the arbitral tribunal's basis of decision refers to the "Rules of Arbitration and Conciliation of the Permanent Court of Arbitration in the Settlement of Disputes."⁹⁸⁾ The "Rules", elaborated by the International Bureau of the Permanent Court of Arbitration in February, 1962, lays down in its Article 30:

"The Tribunal shall decide on the basis of respect for law, unless an agreement between the parties provides for it to rule ex aequo et bono".⁹⁹⁾

2) "the powers of an amiable compositeur"

In a couple of Spanish treaties of friendship and amity, the tribunal is empowered to act as an amiable compositeur. In Article III of the Treaty of Friendship of 27 September 1947 between the Philippines and Spain, it is provided in part that

"This Court (= Arbitration Court) shall have the powers of a referee and its award or decision shall be final and conclusive for both Parties."¹⁰⁰⁾

3) "ex aequo et bono"

The Polish-Czechoslovak Convention of 4 July 1947 for ensuring economic co-operation, Annex No. 15 which constitutes the Protocol concerning mediation and arbitration procedure, Section 9, provides:

"The members of the board of arbitrators shall be completely independent in the exercise of their functions and neither Party may give them any

instructions whatsoever.

The board of arbitrators shall give its decisions ex aequo et bono."101)

Allowing for the fact that this clause is included for mediation and arbitration procedure, and not for arbitration or judicial settlement, it is nevertheless interesting to note that this is an ex aequo et bono decision pure and simple.

In the Federal Republic of Germany's two agreements of 28 January 1971, one with Denmark and the other with the Netherlands, concerning the delimitation of the continental shelf under the North Sea, it is laid down that an arrangement should be made for the exploitation of a mineral deposit when it is found to straddle the boundary line. Then in Article 2, paragraph 4, of each agreement it is provided that

"Should an arrangement pursuant to paragraph 2 or 3 of this article not be concluded within a reasonable period of time, either Contracting Party may refer the matter to the arbitral tribunal provided for in article 5 of this Agreement. The arbitral tribunal may in such cases also decide ex aequo et bono"102)

Normally the arbitral tribunal decides on the basis of the international law applicable between the Contracting Parties on the disputes concerning the interpretation or application of the Agreement or any such arrangement as mentioned above.

Likewise the ex aequo et bono decision is an alternative to a decision on the basis of law in the Netherlands-Belgium Treaty of 13 May 1963 concerning the connection between the Scheldt and the Rhine. Article 42, paragraph 2, of the Treaty reads:

"La Commission arbitrale statue sur la base des dispositions du présent Traité et des principes

généraux du droit international public. Elle statue, au besoin, ex aequo et bono dans les cas visés à l'article 14, paragraph 2, à l'article 16, paragraph 4, à l'article 17, paragraph 3, à l'article 37, paragraph 2, et à l'article 39, paragraph 4, du présent Traité."¹⁰³⁾

In the cases envisaged in the mentioned paragraphs, the arbitral commission is expected to decide "en tenant compte des intérêts de la navigation et de tous les autres intérêts en cause" (Article 14, paragraph 2),¹⁰⁴⁾ "en prenant considération tous les intérêts en cause de part et d'autre" (Article 37, paragraph 2),¹⁰⁵⁾ and "en tenant compte de tous les intérêts liés au canal de jonction" (Article 39, paragraph 4).¹⁰⁶⁾ These may be classified as "relevant circumstances" to be taken into account in the arbitral commission's decision. This Dutch-Belgian treaty has another interesting clause, Article 6 in Annex III: "Composition, Procédure et Détail des Attributions de la Commission arbitrale", which provides:

"Dans tout état du litige, la Commission arbitrale peut proposer aux Parties un règlement amiable."¹⁰⁷⁾

This would seem another characteristic of arbitration clauses of the Benelux countries.

4) "consideration of relevant circumstances"

In a number of treaty clauses it is provided that the arbitral tribunal, or the boundary commission in the case of boundary delimitation treaties, should be authorized to take into account the relevant circumstances of the dispute or situation concerned. For example, in the French-Italian Treaty of Turin of 24 March 1860, Article 3 provides for the consideration of such circumstances in these words:

"... une commission mixte déterminera, dans un esprit d'équité, les frontières des deux Etats en tenant

compte de la configuration des montagnes et de la nécessité de la défense."¹⁰⁸⁾

This is confirmed in more concrete terms in the preamble of the Convention of delimitation of 7 March 1861. On the basis of Article 3 of the Treaty of Turin of 24 March 1860, the staff officers appointed as commissioners by the two Governments, proceeded to

"l'opération du tracé de la ligne de délimitation sur le terrain et sur les plans géographiques, de même qu'à l'étude locale et à la désignation préliminaire des rectifications, échanges et arrangements spéciaux à stipuler, soit pour établir une démarcation convenable, soit pour favoriser, des deux côtés, les propriétaires frontaliers dans des vues commune d'équité."¹⁰⁹⁾

Compensatory considerations which can be seen in the above provisions may also be found in Article 1 of the Argentine-Chilean Convention of Demarcation of 2 March 1904, which runs as follows:

"... if in the course of the material demarcation of the straight lines indicated in the arbitral award, it should result that these lines lie near some ridge or other natural feature that, by its proximity to the same lines, may offer a more permanent boundary, the mixed commission shall ... propose to their respective Governments the substitution of these lines by natural limits on the basis of an equitable compensation."¹¹⁰⁾

Local geographical and economic conditions were mentioned as the relevant circumstances in favour of which the boundary might be diverted slightly in the Treaty of Peace of 10 February 1947 between the Allied Powers and Italy. Article 5, paragraph 5, of the treaty reads in part:

"... les commissaires seront autorisés à s'écarter de 0,5 km de la ligne établie par le présent traité, afin d'adapter la frontière aux conditions géographiques et économiques locales, sous réserve de ne placer sous une souveraineté autre que celle résultant des délimitations stipulées dans le présent traité aucun village ni aucune ville de plus de 500 habitants, aucune route ou voie ferrée importante, ni aucune centre important d'approvisionnement en eau ou de la fourniture d'énergie électrique".¹¹¹⁾

Similarly the Allied Powers-Germany Agreement of 30 August 1924 concerning the Agreement of August 9, 1924, between the German Government and the Reparation Commission provides for the consideration of relevant economic circumstances. Clause 2, paragraph (d)-(ii) runs in these terms:

"In laying down the programmes (i.e., for the deliveries of products), the Arbitral Commission shall take into account the possibilities of production in Germany, the position of her supplies of raw materials and her domestic requirements in so far as necessary for the maintenance of her social and economic life, and also of the conditions set out in the Expert's Report, nor shall it exceed the limits fixed by the Transfer Committee with a view to the maintenance of the German exchange."¹¹²⁾

5) "consideration of special circumstances"

What may be said to be a variant of the relevant circumstances—special circumstances—is provided for as having to be taken into account in the Swedish-Finnish Agreement of 29 September 1972 concerning the Delimitation of the Continental Shelf in the Gulf of Bothnia, the Aland Sea and the Northernmost Part of the Baltic Sea. Article 1 reads:

"The boundary between the areas of continental shelf over which Finland and Sweden respectively exercise sovereign rights for the purpose of the exploration and utilization of natural resources shall in principle be a median line between the baselines from which the breadth of the territorial sea of each country is measured. Departures from this principle have, however, been made in order to take into account, as special circumstances within the meaning of the Geneva Convention, the boundary lines which were established, on the one hand, in the year 1811 in the topographic description of the frontier drawn up after the Peace of Fredrikshamn and, on the other hand, in the Convention of 20 October 1921 relating to the non-fortification and neutralization of the Aland Islands. ..."¹¹³⁾

There have been some agreements on the delimitation of continental shelf in which the existence of islands was thought to constitute an instance of special circumstances as between the parties with opposite coasts and special considerations were given for the median line to deviate in some parts. For example, in the Italian-Tunisian Agreement of 20 August 1971 relating to the delimitation of the continental shelf, Article 1 lays down that the boundary of the continental shelf shall be the median line, taking into account islands, islets and low-tide elevations "with the exception of" four specific islands. Then Article 2 gives each of those islands an envelope of circles with a radius of 12 or 13 nautical miles, the circumference of which forms the boundary line around it.¹¹⁴⁾ Such a treatment of islands is nothing other than the consideration of special circumstances in a given situation.

6) "pursuant to equity"

Reference to equity as the basis of decision is found in Article 25 of the France-China Treaty of Friendship, Commerce and Navigation of 24 October 1844:

"Lorsqu'un citoyen Français aura quelque sujet de plainte ou quelque réclamation à formuler contre un Chinois, il devra d'abord exposer ses griefs au Consul, qui, après avoir examiné l'affaire, s'efforcera de l'arranger amiablement. De même, quand un Chinois aura à se plaindre d'un Français, le Consul écoutera sa réclamation avec intérêt et cherchera à ménager un arrangement amiable. Mais si, dans l'un ou l'autre cas, la chose était impossible, le Consul requerra l'assistance du fonctionnaire Chinois compétent, et tous deux, après avoir examiné conjointement l'affaire, statueront suivant l'équité."¹¹⁵⁾

Similarly, the Venezuela-Netherlands Treaty of 31 March 1978 on the delimitation of the maritime boundary in two areas of the Caribbean Sea, in its Preamble, lays down that the aim of the agreement is to delimit common maritime areas justly and precisely on the basis of equity.¹¹⁶⁾

7) "justice and equity"

The United States-China Treaty of Amity and Commerce of 3 July 1844, Article 24, and the same parties' Treaty of Peace, Amity and Commerce of 18 June 1858, Article 28 have, in part, the following identical provisions:

"And if controversies arise between citizens of the United States and subjects of China, which cannot be amicably settled otherwise, the same shall be examined and decided conformably to justice and equity by the public officers of the two nations acting in conjunction."¹¹⁷⁾

If the "public officers of the two nations acting in conjunction" can be compared to a mixed arbitration commission, it is interesting to note that the arbitrator, as in the Convention of Peace of 28 January 1854 between Costa Rica and Nicaragua, or the mixed arbitral tribunal,

as in the Treaty of Peace of 24 July 1923 between the Allied Powers and Turkey, were to decide in accordance with justice and equity, rather than legal principles, provided that they were dealing with the disputes which came under their jurisdiction.¹¹⁸⁾

8) "law and equity"

The Treaty of Peace and Alliance of 10 July 1654 between Cromwell and the King Jean IV of Portugal provides in its Article 25 for the settlement of outstanding claims "ex jure et aequo".¹¹⁹⁾

In the more recent Convention between Hungary and Czechoslovakia regulating the running of Czechoslovak trains over the Hungarian section of the Cata-Lucenec line of 8 March 1923, Article 1 provides for the tribunal to decide according to law and equity:

"Chacune des Parties contractantes a le droit, en cas de dissentiments surgissant éventuellement de l'interprétation ou de l'exécution de la présente convention, de porter le différend devant un tribunal arbitral. Ce tribunal devra décider selon les dispositions de la présente convention et d'après les principes généraux de droit et d'équité."¹²⁰⁾

9) "equity in the absence of law"

The Bolivian-Peruvian Provision of 20 April 1886 for arbitrating disputes which might arise out of the execution of the boundary convention, after stating in its Preamble that "The most excellent Council of Ministers...desiring, moreover, to render due homage to the principles of justice and conciliation on which South American public law is based...",¹²¹⁾ provides in its Article 4:

"On doubtful, vague or disputed points, the commissioners, proceeding by common accord, shall determine the dividing line in accordance with the

titles of dominion, possession and use, authentic copies of which shall be produced for the purpose.

In the absence of titles, the dividing line shall be determined according to equity and the mutual interest of the parties."¹²²⁾

In the Yugoslav-Romanian Statute of the Mixed Commission for the iron gates of 30 November 1963, an integral part of the Agreement on the iron gates system of the same date, Article 3, paragraph 3 runs as follows:

"The Board for the Settlement of Differences shall settle differences in accordance with the provisions of the Agreement, Conventions and Protocols concerning the Iron Gates System and, in the absence of any provisions applicable to the specific case, in accordance with equity (ex aequo et bono)."¹²³⁾

10) "in an equitable manner"

Iran's agreements with Saudi Arabia, Qatar, Bahrain and the United Arab Emirates concerning the delimitation of the continental shelf state, in their respective Preambles, that the parties are desirous of determining "in a just and accurate manner" and "in a just, equitable and precise manner" the boundary line between the respective areas of the continental shelf over which they have sovereign rights in accordance with international law.¹²⁴⁾

11) "amicable settlement"

In some treaties between one or two of the Benelux countries and the other countries, amicable settlement is provided for with respect to the disputes which arise out of the interpretation or application thereof. Thus Article 9 of the Agreement of 25 February 1965 between Belgium and Luxembourg on the one hand and Bulgaria on the other concerning the indemnification of Belgian and Luxembourgian interests in Bulgaria provides in part:

"Si un différend au sujet de l'exécution du présent Accord venait à se produire, les Gouvernements intéressés rechercheraient une solution à l'amiable au sein d'une Commission intergouvernementale...."125)

The Netherlands agreements on economic and technical co-operation with Indonesia (7 July 1968), Sudan (22 August 1970) and Thailand (6 June 1972) have an identically worded clause, which runs:

"The tribunal shall base its decision on the provisions of the present Agreement in conformity with the principles of law. Before the tribunal gives its decision, it may at any stage of the proceedings propose to the parties that the dispute be settled amicably. The foregoing provisions shall not prejudice the power of the arbitral tribunal to decide the dispute ex aequo et bono if the parties so agree."126)

Here the basis of decision is clearly law. The tribunal is nevertheless empowered to propose an amicable solution before it gives its decision. It may also decide ex aequo et bono, provided the parties agree to it.

Much the same provisions, except for the ex aequo et bono decision, can be found in Article 11 of the Agreement of 30 April 1966 between Austria, Federal Republic of Germany and Switzerland regarding the withdrawal of water from Lake Constance:

"(1) The arbitration commission shall endeavour, at every stage of the proceedings, to bring about an amicable settlement of the case. If it does not prove possible to achieve such a settlement, the commission shall adopt a decision by majority vote....

(2) The arbitration commission shall base its proposals for a settlement and its decision on:

- The provisions of this Agreement;
- Any relevant agreements of a general or special

nature in force between the riparian States;
- The general principles of law."¹²⁷⁾

Likewise the arbitral tribunal in the Netherlands-Federal Republic of Germany Treaty of 8 April 1960 concerning arrangements for co-operation in the Ems Estuary, Article 52, paragraph 5, may endeavour, by discussing with both Governments the dispute referred to it, to bring about an amicable settlement. The tribunal, however, must, under Article 53, paragraph 1, base its decisions on the provisions of this Treaty and on the general rules of international law.¹²⁸⁾

12) "on the basis of mutual interests"

In the Qatar-Abu Dhabi Agreement of 20 March 1969 on the Settlement of Maritime Boundary Lines and Sovereign Rights over Islands, the Preamble states in part:

"... and desirous of settling maritime boundary lines and sovereign rights over islands on the basis of their mutual interests, the Contracting Parties have agreed as follows: ..."¹²⁹⁾

This is a guiding principle for the negotiations in the Preamble, a part of the context in which the terms of the treaty must be interpreted, as laid down in Article 31, paragraphs 1 and 2, of the Vienna Convention on the Law of Treaties of 23 May 1969.¹³⁰⁾

13) "reference of the claim to the Permanent Court of Arbitration"

In a number of treaties on the regulation of the liquor traffic concluded by the United States with some European countries in the mid-1920s, the dispute is to be submitted to the Permanent Court of Arbitration for settlement. For example, in the United States-Germany Convention respecting the Regulation of the Liquor Traffic

of 19 May 1924, Article 4 provides:

"... the claim shall be referred to the Permanent Court of Arbitration The proceedings shall be regulated by so much of Chapter IV of the said Convention (= the Hague Convention for the Pacific Settlement of International Disputes of 1907) and of Chapter III thereof (special regard being had for Articles 70 and 74, but excepting Articles 53 and 54) as the Tribunal may consider to be applicable and to be consistent with the provisions of this Agreement"¹³¹⁾

It will suffice here to say that the settlement of disputes at the Permanent Court of Arbitration by the application of the Convention for the Pacific Settlement of International Disputes of 1907, and especially of Chapter IV thereof, implies the possibility of the basis of decision being "sur la base du respect du droit" as provided in Article 37 of the Convention.

Provisions different in wording but to much the same effect can be seen in Article 4 of the China-Spain Treaty of Amity of 19 February 1953:

"... If settlement cannot be attained through ordinary diplomatic channels such differences and disputes shall be referred to a commission of arbitration to be appointed according to the usual rules of international law, and if this commission fails in its purpose or no agreement can be reached as to its constitution, the Permanent Court of Arbitration at The Hague shall be qualified to solve such differences and disputes."¹³²⁾

14) "application of the provisions of the General Act of 1928"

Article 21 of the Siam-France Treaty of Friendship, Commerce and Navigation of 7 December 1937 provides for any

future disputes which may not be settled diplomatically to be settled by the application of the 1928 General Act in these terms:

"Conformément aux principes énoncés dans le Pacte de la Société des Nations, les Hautes Parties contractantes conviennent d'appliquer les dispositions de l'Acte général pour le règlement pacifique des différends internationaux, adopté le 26 septembre 1928 par l'Assemblée de la Société des Nations, au règlement des questions litigieuses qui surgiraient entre elles dans l'avenir et qui ne pourraient être résolu par la voie diplomatique."¹³³⁾

It will suffice to recall that Article 28 of the General Act has a provision for the decision ex aequo et bono.

15) "arbitration based on the principle of parity"

In at least two treaties of commerce and navigation concluded by the Soviet Union in the mid-1940s, a clause is inserted for the settlement of disputes by means of arbitration. The Treaty of Commerce and Navigation of 17 August 1946 between Denmark and the Union of Soviet Socialist Republics has such a clause in Article 14 which runs:

"The settlement of any disputes which may arise in connection with contracts relating to commerce between the two Parties may be effected by means of arbitration.

Each Contracting Party shall be prepared, at the request of the other Party, to enter into negotiations with a view to concluding an agreement regarding the best method of arbitration on uniform lines based on the principle of parity, and also regarding the method of enforcing arbitration awards. ..."¹³⁴⁾

It is not clear what is meant by the phrase "the best

method of arbitration on uniform lines based on the principle of parity", but it could be inferred that what is intended thereby, and more specifically by "the principle of parity", would be something other than the positive legal rules and principles, which could, if partly, imply considerations of equity.

16) "arbitration, rather than legal proceedings"

The Denmark-Sweden Agreement regarding Ferry-boat Communications between Elsinore and Helsingborg of 14 and 26 January 1920 (to be more precise, between the General Directorate of Danish State Railways and the Royal Railway Administration) provides in paragraph 4:

"In the unlikely event of any dispute arising with regard to the application of this Agreement and its proving impossible to reach an agreed settlement, such disputes shall be decided by arbitration, and may not form the subject of legal proceedings. ..."¹³⁵⁾

Here arbitration is distinguished from "legal proceedings", and may be understood as a dispute settlement procedure which employ extralegal and equitable considerations.

17) "rules of procedure in accordance with justice and equity"

In the series of Treaties of Peace between the Allied and Associated Powers on the one hand and Germany, Austria, Bulgaria and Hungary respectively on the other hand, an identically worded clause is provided for the rules of procedures of the proposed Mixed Arbitral Tribunal on economic matters. Article 304 (Part X: Economic clauses; Section VI: Mixed Arbitral Tribunal), Annex, paragraph 2, of the Treaty of Versailles with Germany of 28 June 1919 reads:

"The Tribunal may adopt such rules of procedure as shall be in accordance with justice and equity and decide the order and time at which each party must conclude its arguments, and may arrange all formalities required for dealing with the evidence."¹³⁶⁾

While it may not follow that the rules of procedure based on justice and equity lead directly to the substantive judgment based on justice and equity, the basis of substantive decision could not be clearly separated from the rules of procedure laid down in accordance with justice and equity.

18) "rules of procedure of the Hague Convention"

The rules of procedure as laid down in the Hague Convention of 1899 or 1907 for the Pacific Settlement of International Disputes may be employed for arbitration under some treaties. For example, Article 4 of the Treaty between the Netherlands and Venezuela concerning the Re-establishment of Diplomatic Relations of 11 May 1920 provides in part:

"Should the High Contracting Parties be unable to agree as regards the rules for the arbitration procedure, the rules laid down in the Hague Convention of July 29th 1899, for the Pacific Settlement of International Disputes shall be observed."¹³⁷⁾

19) "rules of procedure to be decided by the tribunal"

The rules of procedure are to be decided by the arbitral tribunal itself where there is no provision for the applicable law in some bilateral air transport agreements and other functional treaties. Thus the Air Transport Agreement of 31 August 1957 between the Federal Republic of Germany and Uruguay, Article 13, paragraph 3, provides:

"In the event of failure to reach an amicable settlement, the arbitral tribunal shall take its decision by majority vote. Unless otherwise agreed by the Contracting States, the arbitral tribunal shall determine its own rules of procedure and place of meeting."¹³⁸⁾

Provisions to the same effect may be found in some functional bilateral agreements between States and international organizations such as the International Development Association, the International Atomic Energy Agency and the European Organization for Nuclear Research.¹³⁹⁾

20) "provisions of the European Convention on International Commercial Arbitration"

In the French-Soviet Agreement concerning the Mutual Protection and Use of Industrial Property Rights of 19 May 1970, Article 7 provides for the basis of decision in these terms:

"... Si la procédure de conciliation n'a pas été mise en oeuvre ou si elle n'a pu aboutir au règlement du litige, celui-ci est soumis à l'arbitrage conformément aux dispositions de la Convention européenne sur l'arbitrage commercial international, signée à Genève le 21 avril 1961."¹⁴⁰⁾

The relevant provisions of the said Convention may be found in Article 7, entitled Applicable Law:

"1. The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the

terms of the contract and trade usages.

2. The arbitrators shall act as amiable compositeurs if the parties so decide and if they may do so under the law applicable to the arbitration."¹⁴¹⁾

4. Special Agreements (Compromis)

The special agreements which it is proposed here to analyze in the same way as the bilateral treaties in Section 3 above are the agreements or compromis to submit specific disputes to arbitration for settlement. As each dispute has its own peculiar circumstances, the special agreement for its submission to arbitration is more or less of a nature of being sui generis. Yet it seems possible to point out some identical or similar expressions prescribing the basis of decision in a certain category of clauses, and other phrases in other clauses. This seems especially true in special agreements on disputes involving claims for damages in one way or another.

Thus it is proposed in this Section conveniently to divide special agreements into two groups: one is special agreements for arbitration of claims cases, and the other is those for arbitration of territorial and boundary disputes, the number of which is much smaller and which each has a stronger nature of being sui generis.

(1) Special Agreements for Arbitration of Claims Cases

1) "according to equity"

A typical clause providing for equity as the basis of decision is Article 1 of the British-Spanish Convention of 12 March 1823 for the settlement of British claims, which read in part:

"A Mixed Commission, English and Spanish, consisting of two Members of each Nation, shall ... meet ... for the purpose of taking into consideration

and deciding in a summary manner, according to equity, upon all cases that shall be brought before it"142)

A variant of this formula is contained in an Ecuador-Italy Protocol of 28 March 1898 for the settlement of the claims of the Salesian priests. The protocol, after nominating two persons as the conciliatory arbitrators and amiables compositeurs in Article 1, provides in Article 2:

"The arbitrators shall decide in accordance with the rules of equity and public conveniences, without being subject to laws nor judicial procedures."143)

2) "upon a basis of absolute equity"

In ten "Protocols" of 1903 submitting to arbitration claims of the citizens of ten Euro-American States against Venezuela, the basis of decision was "absolute equity", with additional provisions which seem to strengthen it. Article 1 of the United States-Venezuela Protocol of 17 February 1903, the earliest of the ten, runs in part as follows:

"... Before assuming the functions of their office the Commissioners and the Umpire shall take solemn oath carefully to examine and impartially decide, according to justice and the provisions of this Convention, all claims submitted to them

The Commissioners, or in case of their disagreement the Umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation. ..."144)

3) "according to justice and equity"

This formula, frequently found in compromis on claims cases, first appeared in the modern history of

international arbitration in the Jay Treaty of 1794. Article 6, which laid down that the outstanding debts of British subjects should be repaid by United States citizens, of the Treaty of Amity, Commerce and Navigation of 19 November 1794 between Great Britain and the United States provides in part:

"... one of the Commissioners appointed ... do solemnly swear or affirm, that I will honestly, diligently, impartially and carefully examine, and to the best of my judgment, according to justice and equity, decide all such complaints, as ... shall be preferred to the said Commissioners. ...

The said Commissioners ... are empowered and required ... to take into their consideration all claims ... according to the merits of the several cases, due regard being had to all the circumstances thereof, and as equity and justice shall appear to them to require. ..."¹⁴⁵⁾

It should be noted that in the second of the quoted paragraphs is the phrase "due regard being had to all the circumstances [of the several cases]", in addition to "according to the merits of the several cases" and "equity and justice".

A "justice and equity" formula with an interesting accompanying explanation appears in a few special agreements between Mexico and the Euro-American States for the settlement of claims of their nationals arising from the revolutionary acts of Mexico during the 1910s. Article 2 of the Mexico-United States Convention for the Settlement of Claims of U.S. citizens Arising from Revolutionary Acts in Mexico from November 20, 1910, to May 31, 1920, signed in Mexico City on 10 September 1923, provides in part in these terms:

"... each member of the Commission, before entering upon his duties, shall make and subscribe a solemn declaration stating that he will carefully and

impartially examine and decide, according to the best of his judgment and in accordance with the principles of justice and equity, all claims presented for decision. ...

The Mexican Government desires that the claims shall be so decided because Mexico wishes that her responsibility shall not be fixed according to the generally accepted rules and principles of international law, but ex gratia feels morally bound to make full indemnification"146)

Article 6 further provides:

"Since the Mexican Government desires to arrive at an equitable settlement of the claims of the citizens of the United States and to grant them a just and adequate compensation for their losses or damage, the Mexican Government agrees that the Commission shall not disallow or reject any claim by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim."147)

For unknown reasons the phrase "justice and equity" is replaced by "equity" in the French-Mexican and German-Mexican agreements,¹⁴⁸⁾ which otherwise have much the same wording with the above-mentioned in the relevant clauses.

4) "carefully and impartially"

This somewhat ambiguous expression could be interpreted as a guide for the basis of decision where there is no express provision for it. Thus in the British-Spanish Agreement of 4 March 1868 to refer to a Mixed Commission the claim of the British schooner Mermaid Article 2 reads in part:

"... The Commissioners ... before entering upon the execution of their duties shall make and subscribe a solemn declaration that they will carefully examine and impartially decide the question submitted to them"149)

The formula appeared as early as 1794 in the Jay Treaty, repeating itself in a number of subsequent special agreements concluded by Great Britain and the United States with the other European States. In so far as no other express basis of decision is provided than "careful" examination and "impartial" decision, the Commissioners would be empowered implicitly to give equitable considerations to the claims of the parties.

What may be understood as substantiating such discretion of the arbitral tribunal can be found in a clause in the Agreement of 27 August 1921 between Great Britain and Peru respecting the mineral property "La Brea y Pariñas". After giving the traditional formula of "carefully and impartially" in Article 4,¹⁵⁰⁾ the Agreement in Article 10 provides in part:

"... In case the Tribunal should, before rendering its award, suggest terms of settlement which the two Governments may accept as satisfactory, or in case the two Governments should themselves agree upon terms of settlement, the Tribunal shall, in either case, incorporate such settlement in an Award, which shall be treated as the Award of the Tribunal. ..."151)

The Tribunal's being empowered to suggest terms of settlement implies its wide discretion, something like that of an amiable compositeur.

5) "equitable or just solution"

In the Protocol which was adopted on 30 July 1858 in the 13th session of the Conference between Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey

concerning the organization of the Principalities of Moldavia and Wallachia, the last paragraph provides:

"M. le Plénipotentiaire de Russie appelle l'attention de la Conférence sur le conflit existant, dans les Principautés, touchant les biens des couvents dédiés. Après examen, la Conférence décide que, pour donner une solution équitable au différend qui existe à ce sujet entre les Gouvernements des Principautés et le Clergé grec, les parties intéressées seront invitées à s'entendre entre elles au moyen d'un compromis; ..."152)

The various expressions of "justly and equitably", "le plus juste", "equitable and just", "just decision", "in a just and equitable manner", and so forth may be grouped under the present heading.¹⁵³⁾

"Amicable settlement" could be thought a variant. It is provided in Article 8 of the Argentine-French Convention d'Indemnité of 21 August 1858 for the settlement of French claims arising from the Argentine civil war.¹⁵⁴⁾ Similar provisions are in the Argentine-British and Argentine Sardinian conventions for the settlement of British and Sardinian claims respectively.¹⁵⁵⁾

As another variant could be considered "the judgment of the tribunal", which appears, for example, in Article 5 of the British-Portuguese Minute of instructions of 13 November 1840 agreed upon between Viscount Palmerston and Baron Moncorvo for the guidance of the Members of the Mixed British and Portuguese Commission on the claims of British subjects who served in the Portuguese Army and Navy during the war for the liberation of Portugal.¹⁵⁶⁾ A similar provision can be found in Article 3 of the Special Convention of 4 February 1859 between the United States and Paraguay relative to the claims of the United States and Paraguay Navigation Company.¹⁵⁷⁾

6) "amiable compositeur"

The United States-Peru Convention of Claims of 20 December 1862 provides in Article 1:

"The two Contracting Parties agree in naming as arbiter, umpire and friendly arbitrator, His Majesty the King of Belgium, conferring upon him the most ample power to decide and determine all the questions both of law and fact involved in the proceedings of the Government of Peru in the capture and confiscation of the ships Lizzie Thompson and Georgiana."¹⁵⁸⁾

The "friendly arbitrator" or "amigable componedor" in the Spanish text, i.e. amiable compositeur, is thus granted "the most ample power to decide and determine all the questions both of law and fact", which describes the nature of the amiable compositeur.

An interesting association of it with the power to decide ex aequo et bono is provided in the Chile-United States Convention of arbitration of 6 December 1873 relative to the frigate Good Return and the Chile-France Protocol of 3 July 1897 for the submission to arbitration of claims of Frenchman Carlos Fréaut. Article 1 of the former runs in part:

"The Governments of Chile and the United States of North America ... nominate Señor Don Carlos F. Levenhagen, Minister Residentiary of the German Empire in Chile, so that he may, as a conciliatory arbitrator and amiable compositeur, decide with full powers, proceeding ex aequo et bono, on the following points"¹⁵⁹⁾

Article 1 of the Chile-France protocol has an identical wording for the relevant provision.¹⁶⁰⁾

The Treaty of Peace of 26 April 1898 between Costa Rica and the Republic of Central America has another interesting clause, which, although not employing the

expression amiable compositeur, in substance provides for it. Article 3 lays down that the Tribunal should decide "according to international law, as it may consider just and equitable", but Article 7 has another characterization of the Tribunal in these words:

"The Judges of this Tribunal will try the questions submitted to them, and pass their verdict thereon, in the character not only of Arbitrators, but also as peacemakers, allowing that feeling of charity to enter into their counsels which should reign where vexatious incidents have occurred between brothers, and taking into account how greatly a prompt settlement, dictated by friendship, will redound to the benefit of the mutual interests of Central America"161)

7) "ex aequo et bono"

The formula seems to have first appeared in the compromis of the Macedonian claims case. The United States-Chile Convention of 10 November 1858 for the arbitration of Macedonian claims provides in its Preamble in these terms:

"... Therefore the above-named ministers agree to name his Majesty the King of Belgium as arbiter, to decide with full powers and proceeding ex aequo et bono, on the following points"162)

It is provided as an alternative, at least formally, to "law" in Article 3 of the Brazil-Peru Convention of arbitration of 12 July 1904 for the settlement of complaints of their citizens:

"... the Tribunal should examine and resolve all claims, with the power to judge them according to law or ex aequo et bono."163)

8) "according to evidence"

Article 1 of the United States-Mexico Convention of 11 April 1839 for the settlement of the claims of American citizens provides:

"... The said Commissioners, so appointed, shall be sworn impartially to examine and decide upon the said claims according to such evidence as shall be laid before them on the part of the United States and the Mexican Republic respectively."¹⁶⁴⁾

Examination of evidence would involve considerations of equity, as well as those of law and fact.

9) "taking into account all relevant matters"

The equitable formula appears in Article 311 of the Treaty of Peace at Sèvres of 10 August 1920, which deals with the British intention to buy out a French railway company, a former concessionaire in Turkish territory, and to provide equitable compensation for it:

"... The Tribunal shall take into account, from both the legal and equitable standpoints, all relevant matters, on the basis of the maintenance of the contract adapted as indicated in the following paragraph. ..." ¹⁶⁵⁾

A variant phrase "the legitimate needs of the parties concerned" is provided in the clauses dealing with cessions concerning navigation of river systems in the Versailles Treaty of Peace of 28 June 1919. Article 339, for example, runs in part:

"... The number of the tugs and boats, and the amount of the material so ceded, and their distribution, shall be determined by an arbitrator or arbitrators nominated by the United States of America, due regard

being had to the legitimate needs of the parties concerned, and particularly to the shipping traffic during the five years preceding the war"166)

- 10) "to the best of the arbitrator's judgment and according to law"

In the United States-Spain Agreement of 12 February 1871 for the settlement of certain claims of United States citizens arising from the insurrection in Cuba, Article 2 combines the traditional solemn declaration on the part of the arbitrator and the legal basis of decision in these terms:

"The arbitrators and umpire ... shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially hear and determine, to the best of their judgment, and according to public law and the treaties in force between the two countries and these present stipulations, all such claims as shall, in conformity with this agreement, be laid before them"167)

The Colombia-Ecuador Convention of 28 June 1884 for the arbitration of claims of citizens of the former against the Government of the latter, after providing for the traditional oath on the part of the arbitrators in Article 1,¹⁶⁸⁾ stipulates in Article 3:

"The commission of arbiters shall decide the claims on the merits of the evidence presented in accordance with the principles of international law and the legal precedents established by analogous modern tribunals of high authority."169)

Provisions to the same effect, though in a different wording, are in the Protocol of 18 August 1894 between Italy and Colombia for the arbitration of the Cerruti claim over the losses and damage to his property in Colombia

during the political troubles of 1885:

"... As soon as the arbitrator by his acceptance of the office shall have qualified himself to enter upon his functions, he shall become vested with full power, authority and jurisdiction to do and perform, and to cause to be done and performed all things without any limitation whatsoever, which in his judgment may be necessary or conducive to the attainment, in a fair and equitable manner, of the end and purposes which this agreement is intended to serve.

And he shall thereupon proceed to examine and decide according to the documents and evidence that may be submitted to him ... and the principles of public law¹⁷⁰⁾

- 11) "to the best of the arbitrator's judgment and according to justice, equity and law"

Article 7 of the Jay Treaty, providing for the settlement of claims for damage arising from maritime captures, lays down that, after having taken an oath or affirmation that they will honestly, diligently, impartially and carefully examine, and to the best of their judgment, according to justice and equity, decide the complaints brought to them,

"[the five Commissioners] shall decide the claims in question, according to the merits of the several cases, and to justice, equity and the laws of nations."¹⁷¹⁾

In the same Article the Commissioners are to "receive testimony, books, papers and evidence in the same latitude" as in Article 6 which deals with pecuniary claims, and "exercise the like discretion and powers respecting [the amount of the losses and damage]".¹⁷²⁾ It is interesting to note that the basis of decision in Article 6 is "justice and equity",¹⁷³⁾ rather than "justice, equity and the laws of nations" as in Article 7.¹⁷⁴⁾

- 12) "according to justice and in compliance with the provisions of this convention"

In the United States-Ecuador Convention of 25 November 1862 relative to the claims of citizens of the two countries, Article 1 provides in part:

"... The Commissioners ... before proceeding to business shall make solemn oath that they will carefully examine and impartially decide according to justice, and in compliance with the provisions of this Convention, all claims that shall be submitted to them"¹⁷⁵⁾

- 13) "according to law and/or equity"

An Act of Congress, dated 2 March 1901, in implementation of Article 7 of the United States-Spain Treaty of Peace of 10 December 1898, provides in part for the basis of decision that the Commission should "adjudicate said claims according to the merits of the several cases, the principles of equity and of international law".¹⁷⁶⁾ Article 7 of the Treaty of Peace stipulates that the parties relinquish their claims mutually which may have arisen since the insurrection in Cuba, and that the United States will adjudicate and settle the claims of its citizens against Spain relinquished in the Article.¹⁷⁷⁾

In a tripartite convention of 7 November 1899 between Great Britain, Germany and the United States relating to the settlement of certain claims in Samoa by arbitration, Article 1 provides for the basis of decision in these terms:

"All claims ... shall be decided by arbitration in conformity with the principles of international law or considerations of equity."¹⁷⁸⁾

Domestic and international law and practice, together with equitable considerations, are provided in the special agreement on the Trail Smelter case. Article 4 of the Canada-United States Convention of 15 April 1935 regarding claims arising from the operation of the smelter at Trail, British Columbia runs as follows:

"The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as International Law and Practice, and shall give consideration to the desire of the High Contracting Parties to reach a solution just to all parties concerned."¹⁷⁹⁾

Needless to say, "consideration to the desire of the High Contracting Parties to reach a solution just to all parties concerned" is an equitable one. The domestic practice in the United States followed in dealing with cognate questions could perhaps imply equitable considerations.

14) "on the basis of respect for law"

In the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981, which was to enter into force with the notification of adherence by the parties, the "respect for law" formula was adopted. Article 5 provides:

"The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."¹⁸⁰⁾

The Tribunal Rules of 3 May 1983, Article 33, paragraph 1, has the identical wording, while its paragraph 2 refers to

an ex aequo et bono decision: "The arbitral tribunal shall decide ex aequo et bono only if the arbitrating parties have expressly and in writing authorized it to do so."¹⁸¹⁾

15) "provisions of the Hague Convention"

In the United States-Mexico Protocol of an agreement, dated 22 May 1902, for the adjustment by arbitration of certain contentions arising under what is known as "The Pious Fund of the Californias", preambular paragraph 3 provides in part:

"... and the High Contracting Parties, animated by a strong desire that the dispute so arising may be amicably, satisfactorily, and justly settled, have agreed to submit said controversy to the determination of Arbitrators, who shall, unless otherwise herein expressed, be controlled by the provisions of the International Convention for the pacific settlement of international disputes, commonly known as the Hague Convention"¹⁸²⁾

Reference to the Hague Convention could imply that the basis of decision should be "sur la base du respect du droit", although it may be said to be a truism since the Arbitrators in this case are those of the Permanent Court of Arbitration.

16) "rules of procedure conforming to justice and equity"

The Agreement of 12 June 1952 between some Allied Powers and Japan for the settlement of disputes arising under Article 15 (a) of the Treaty of Peace with Japan, Article 5 provides for the manner in which the commission's rules of procedure should be adopted, rather than the basis of decision, in these words:

"Each commission created under the Agreement shall determine its own procedure, adopting rules conforming

to justice and equity"¹⁸³⁾

Let it suffice here to say that the commission's power to determine its rules of procedure could imply its latitude, and consequently the possibility of equitable considerations.

17) "rules of procedure of the Hague Convention"

Article 7 of the French-Greek Compromis d'arbitrage of 15 July 1931 for the settlement of the Lighthouses case runs in part in these terms:

"... Pour le surplus, le tribunal se conformera aux règles de la procédure arbitrale insérées au chapitre III du titre IV de la Convention pour le règlement pacifique des conflits internationaux signée à La Haye de 18 octobre 1907."¹⁸⁴⁾

This implies the possibility of the tribunal, following the rules of procedure of the Hague Convention, of giving equitable considerations in the merits of the case, as well as the matters of procedure.

(2) Special Agreements for Arbitration of Territorial and Boundary Disputes

1) "scrupulous and impartial decision"

In the Island of Lamu case between Germany and Great Britain the Award dated 17 August 1889 shows in the following terms the arbitrator's basis of decision:

"Nous, baron Lambermont ... ayant accepté les fonctions d'arbitrage ...; animé du désir sincère de répondre par une décision scrupuleuse et impartiale à la confiance que les deux gouvernements nous ont témoignées; ..." ¹⁸⁵⁾

The Anglo-American Convention of 24 January 1903 for the adjustment of the boundary between Canada and Alaska, Article 1 provides for the obligation of the members of the tribunal to subscribe an oath and thus lays down a similar basis of decision.¹⁸⁶⁾ But a further legal basis of decision is prescribed in Article 3, which runs in part:

"It is agreed by the High Contracting Parties that the Tribunal shall consider in the settlement of the questions submitted to its decision the Treaties respectively concluded between His Britannic Majesty and the Emperor of All the Russias

The Tribunal shall also take into consideration any action of the several Governments, or of their respective Representatives, preliminary or subsequent to the conclusion of said Treaties"¹⁸⁷⁾

2) "exchange of territory"

In the Bulgaria-Servia Arrangement for the Renewal of Diplomatic Relations of 13/25 October 1886, a political give-and-take is provided in Article 1:

"Le Gouvernement Princier de Bulgarie regrettant l'incident de Bregovo qui avait altéré les relations d'amitié entre les deux États voisins, fera évacuer le terrain contesté vis-à-vis de ce village, immédiatement après la signature du présent Acte. Le terrain dont il s'agit sera déclaré neutre jusqu'à la solution définitive de la question dite de Bregovo, par une Commission Serbo-Bulgare qui sera nommée à cet effet. Dans le cas où l'endroit contesté serait attribué par la Commission à la Serbie, le Gouvernement Royal consent en principe à le céder à la Bulgarie en échange d'un terrain équivalent sur un autre point de la frontière."¹⁸⁸⁾

3) "according to evidence"

Article 5 of the Jay Treaty of 1794, dealing with the dispute over what river was intended under the name of River St Croix in the Anglo-American Treaty of Peace of 1783, does not give any other basis of decision than "according to evidence" and "impartially":

"... the three Commissioners so appointed shall be Sworn impartially to examine and decide the said question according to such Evidence as shall respectively be laid before Them on the part of the British Government and of the United States. ..."189)

Very much the same provisions are in Article 4 of the Great Britain-United States Treaty of Peace (or Treaty of Ghent) of 24 December 1814,¹⁹⁰⁾ and more recently in Article 3, paragraph (ii), of the India-Pakistan Agreement of 30 June 1965 for the Rann of Kutch arbitration.¹⁹¹⁾

4) "arbitrators of equity, acting ex aequo et bono"

In the Bolivia-Paraguay Treaty of Peace, Amity and Boundaries of 21 July 1938, Article 2 provides in part:

"La ligne frontière dans le Chaco entre la Bolivie et le Paraguay ... sera déterminée par les Présidents des Républiques suivantes: Argentine, Brésil, Chili, Etats-Unies d'Amérique, Pérou et Uruguay, en qualité d'arbitres selon l'équité, lesquels, agissant ex aequo et bono, formuleront leur décision arbitrale conformément à la présente clause et aux clauses ci-après: ..."192)

Article 3 further provides:

"Les arbitres se prononceront après avoir entendu les Parties et en toute conscience, compte tenu de l'expérience acquise par la Conférence de la Paix et

des avis formulés par les assesseurs militaires de ladite conférence. ..."¹⁹³⁾

5) "equitable solution"

Article 4 of the Persia-Turkey Treaty of delimitation of 31/19 May 1847 provides for the basis of decision in these words:

"Il est respectivement décidé que des Commissaires seront immédiatement nommés de part et d'autre, pour juger et régler d'une manière équitable les questions des dommages essuyés des deux côtés depuis l'acceptation des propositions amicales tracés et communiquées par les deux grandes Puissances médiatrices au mois de Djémaziy-ul-Evvel, 1261; ainsi que celles des droits de pâturages depuis l'année où leur paiement a été arriéré."¹⁹⁴⁾

A "just and expedient" decision is provided for in Article 5 of the Honduras-Salvador Preliminary convention of 18 December 1880 for the arbitration of questions concerning the ownership of frontier lands and towns:

"If the documentary proof should be insufficient on any point, or if doubts should arise as to its applicability to the decision of the boundary dispute between the contracting parties, the arbiter may determine the doubtful points in the manner which he may judge most just and expedient, giving consideration to the special needs of the respective peoples, and especially to matters which may reconcile in a satisfactory manner their adverse claims, so as to secure, by means of a compromise, their acquiescence and satisfaction."¹⁹⁵⁾

In the Bolivia-Peru Treaty of arbitration of 30 December 1902 for the settlement of the boundary questions, the basis of decision is the law but equitable decision may

be sought when the law does not define the right of possession to a territory in a clear manner. Article 3 runs as follows:

"For the purposes of his award, the Arbitrator shall act in conformity with the laws in the Collection of Statutes of the Indies, Royal Letters Patent and Orders, Ordinances of the Provincial Governors, diplomatic instruments relating to the demarcation of the frontiers, official maps and descriptions, and generally, with such documents of official character as may have been issued, so as to give the true interpretation to and carry out the royal dispositions in question."¹⁹⁶⁾

And Article 4 reads:

"Wherever the royal enactments or dispositions do not define the right of possession to a territory in a clear manner, the Arbitrator shall decide the question equitably, keeping as far as possible to their meaning and to the spirit which inspired them."¹⁹⁷⁾

Similarly the relevant treaties, which is the basis of decision, may be put aside for an equitable solution in the Colombia-Ecuador Convention of 5 June 1907, which supplements the Treaty of 5 November 1904. In Article 10 the Convention provides:

"The arbiters shall determine the dividing line in accordance with existing treaties and the modifications established by the present convention; but they may, leaving to one side strict law, adopt an equitable line in accordance with the necessities and convenience of the two countries."¹⁹⁸⁾

6) "according to justice and equity"

"Justice and equity" is provided for as the basis of decision, along with "impartially, carefully and to the

best of the arbitrator's judgment", in Article 1 of the Anglo-American Treaty of 5 June 1854 relating to fisheries, commerce and navigation, which deals with the prevention or settlement of any disputes as to the places reserved for British and American fishermen respectively:

"... The said Commissioners, before proceeding to any business, shall make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, without fear, favour, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of fishing under this and the next succeeding article"199)

7) "according to law and justice or equity"

In the Honduras-Salvador Convention of boundaries of 19 January 1895, Article 2, paragraph 4, provides for the basis of decision of the mixed commission in these words:

"The Mixed Commission, to fix the boundaries, will pay attention to the territory control plainly proven. The possession shall only be valued as it is just, legitimate and adequate, in accordance with the general principles of law and with the rules of justice which the Law of Nations has sanctioned on this particular matter."200)

The Great Britain-Venezuela Treaty of 2 February 1897 respecting the settlement of the boundary between British Guiana and Venezuela has more specific "Rules" for the basis of decision. Thus Article 4 runs in part:

"In deciding the matters submitted, the Arbitrators ... shall be governed by the following Rules, which are agreed upon by the High Contracting Parties as Rules to be taken as applicable to the

case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to be applicable to the case:

Rules ...

- (c) In determining the boundary-line, if territory of one Party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require."²⁰¹)

Not only law and equity are expressly referred to but also the relevant circumstances of fact are detailed in Article 4 of the special agreement of 30 July 1954 between Great Britain on behalf of the Ruler of Abu Dhabi and His Highness the Sultan Said bin Taimur on the one hand and Saudi Arabia on the other:

"... the Tribunal shall have due regard to all relevant considerations of law, fact and equity brought to its attention by the Parties In particular, but without being limited thereto [the Tribunal is instructed to] take into account the following factors in so far as it deems them relevant:

- (a) Historical facts relating to the rights of His Majesty the King of Saudi Arabia and his forefathers and the rights of the other Rulers concerned and their forefathers;

- (b) The traditional loyalties of the inhabitants of the area concerned;

- (c) The tribal organization and the way of life of the tribes inhabiting the area concerned;

- (d) The exercise of jurisdiction and other activities in the area concerned;

- (e) Any other considerations brought to its attention by either Party."²⁰²)

8) "provisions of the Hague Convention"

In the Great Britain-United States Special Agreement of 27 January 1909 for the submission to arbitration of questions relating to fisheries on the North Atlantic Coast at a Tribunal to be chosen from the general list of the Permanent Court of Arbitration at The Hague, Article 5 naturally refers to the "provisions of the Convention for the Pacific Settlement of International Disputes of 18 October 1907, excepting Articles 53 and 54" for the basis of decision.²⁰³⁾

Likewise the French-Spanish Treaty of 27 November 1912 regarding relations in Morocco, Article 27 refers to the Hague Convention as follows:

"La Convention du 26 février, 1904, renouvelée le 3 février, 1909, ainsi que la Convention générale de La Haye du 18 octobre, 1907, s'appliqueront aux différends qui viendraient à s'élever entre les parties contractantes au sujet de l'interprétation et de l'application des dispositions de la présente Convention et qui n'auraient pas été réglées par la voie diplomatique; un compromis devra être dressé et il sera procédé suivant les règles des mêmes Conventions en tant qu'il n'y serait pas dérogé par un accord exprès au moment du litige."²⁰⁴⁾

A technical commission for demarcation, however, is empowered under Article 4 to take account of some relevant circumstances in its work:

"Une commission technique, dont les membres seront désignés en nombre égal par les Gouvernements français et espagnol, fixera le tracé exact des délimitations spécifiées aux articles précédents. Dans son travail, la Commission pourra tenir compte non seulement des accidents topographiques, mais encore des contingences locales. ..."²⁰⁵⁾

9) "taking into account the relevant circumstances"

Article 3 of the Nassau-Prussia Treaty of Vienna of 31 May 1815, providing for the cession of territory, stipulates the basis of decision of the Commissioners in these terms:

"... Les Commissaires se conformeront au principe de la contiguïté de ces Portions avec les Territoires respectifs, et auront un soin particulier pour que les rapports communaux, ecclésiastiques et industriels actuellement existants, soient maintenus; ..."206)

In a like manner Article 3 of the Great Britain-Russia Protocol of 10 September 1885 relative to the Afghan frontier provides that the Commissioners, in tracing the frontier, "tiendront dûment compte des Localités et des nécessités et du bien-être des populations locales."207)

The Latvia-Lithuania Convention of 28 September 1920 providing for the settlement of frontier questions by a Mixed Commission of Arbitration and the Estonia-Latvia Convention of 22 March 1920 entrusting the final determination of the frontier to the arbitration of a Joint Commission have much the same provisions in the way of referring to the relevant circumstances. Article 3 of the former runs in part as follows:

"En prenant sa résolution, la Commission doit tenir compte des principes ethnographiques, historiques, des intérêts politiques et des intérêts d'Etat de chaque pays (militaires, stratégiques, économiques et de communications), de même que des intérêts de la population locale. ..."208)

In a most recent Special Agreement of 10 June 1977 between Libya and Tunisia for the Submission of the Question of the Continental Shelf between the Two Countries to the International Court of Justice, Article 1 defines the request for the Court in the following terms:

"The Court is requested to render its Judgment in the following matter:

What are the principles and rules of international law which may be applied for the delimitation of the area of the continental shelf appertaining to the Republic of Tunisia and the area of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and, in rendering its decision, to take account of equitable principles and the relevant circumstances which characterize the area, as well as the recent trends admitted at the Third Conference on the Law of the Sea. ..."209)

Regard to actual conditions and international law was mentioned in the Norway-Sweden compromis of 14 March 1908 for the arbitration of the Grisbadarna case. Article 3 runs:

"The Court of Arbitration shall have power to determine how far the boundary line shall be considered to be, either wholly or in part, determined by the Boundary Treaty of 1661, together with the charts appertaining to the same, and how such boundary line is to be drawn, and also, in so far as the boundary line can be considered as undetermined by the Treaty and chart in question, shall have power to determine the same, having regard to actual conditions and the principles of international law."210)

10) "in view of the reasons and documents produced"

The Argentina-Brazil Treaty of Arbitration of 7 September 1889, Article 5 provides:

"The frontier is to be formed by the rivers which Brazil or the Argentine Republic has designated, and the arbitrator shall be requested to decide in favour of one of the parties as shall seem to him just in

view of the reasons and documents which they shall have produced."²¹¹⁾

11) "according to equitable principles"

In the Special Agreement between Tunisia and Libya submitting their dispute over the continental shelf delimitation to the International Court of Justice, signed on 10 June 1977, specific reference was made to "equitable principles" as the basis of decision. Article 1, in the English translation of the original Arabic text, supplied by Libya, runs in part:

"... the Court shall take its decision according to equitable principles, and the relevant circumstances which characterize the area, as well as the new accepted trends in the Third Conference on the Law of the Sea."²¹²⁾

The mention of "equitable principles" and the "relevant circumstances" has no doubt drawn upon the judgment of the Court in the North Sea Continental Shelf cases of 1969.²¹³⁾

If this is a specification, as it ought to be, of the provisions of Article 38, paragraph 1, of the Court's Statute, it is an interesting instance of specification. The above provision is further noteworthy in that it mentions "the new accepted trends in the Third Conference on the Law of the Sea", which can be a dangerous departure from the application of the law.

* * * * *

In the provisions analyzed above in the special agreements concerning territorial and boundary disputes, what may be of interest to note is that none refers to the arbitrator's or the tribunal's power to decide his or its rules of procedure.

5. Conclusions

The foregoing analysis has shown that arbitration treaties and clauses contain a wide variety of expressions for an equitable basis of decision. From it may be drawn a set of conclusions, but it would be well, before proceeding to conclusions, to remember that the clauses collected and analysed above do not include those which have a legal basis of decision only, and that the collected clauses cannot claim by any means to be an exhaustive list of equity clauses. They are clauses containing an equitable basis of decision, or else an equitable basis of decision along with a legal one. Bearing this in mind, these conclusions follow by way of a summary.

Multilateral arbitration treaties of a general nature, such as the Hague Convention for the Pacific Settlement of International Disputes, the Statute of the Permanent Court of International Justice and the General Act for the Pacific Settlement of International Disputes, have provided models for subsequent arbitration treaties and clauses. The Hague Convention's formula of "sur la base du respect du droit" has been adopted in treaties of the Benelux countries, and indeed alluded to in every category of treaty. The "ex aequo et bono" formula with the consent of the parties under Article 38, paragraph 2, of the Statute has been extensively used, especially in bilateral general arbitration treaties, often with a variety of qualifications. The General Act's "ex aequo et bono" formula, silent on the consent of the parties, has been employed much less than the Hague Convention and the Statute of the Permanent Court of International Justice.

Of the restricted multilateral treaties, the regional arbitration treaties have adopted the formulas of the earlier general multilateral arbitration treaties with or without modifications in their wording. The only exception is the Convention Establishing the Central American Court of Justice of 20 December 1907, which did not follow the Hague Convention's formula but provided for the Court's "free judgment" with respect to the decision of points of

facts and "principles of international law" with respect to points of law.

The multilateral functional treaties have arbitration clauses providing for equitable bases of decision which are not necessarily copies of the formulas of the earlier multilateral general arbitration treaties.

In the three multilateral treaties for the settlement of commercial or civil law disputes, arbitration treaties of a specialized category, the two of Western countries provide for a legal basis of decision with an alternative basis of "amiable compositeur" or "ex aequo et bono", whereas the third of East European countries seems to tend towards equity for a basis of decision.

There are a few points to make with respect to bilateral general arbitration treaties. First, in these treaties there are not many clauses providing for a basis of decision in terms of only equity or equitable considerations in contradistinction to law. For example, the ex aequo et bono formula is more often than not qualified by some additional phrases referring to law. Secondly, the relevant provisions of the Hague Convention for the Pacific Settlement of International Disputes, the Statute of the Permanent Court of International Justice (or more recently the International Court of Justice) and the General Act for the Pacific Settlement of International Disputes, and especially the first two, are either employed or alluded to in many clauses of treaties of this category. Thirdly, despite frequent reference to the Hague Convention, no clause in these treaties expressly provides for recourse to it for the tribunal's rules of procedure or for the tribunal itself to decide its rules of procedure. Fourthly, "equitably", "in a friendly manner" and the like expressions are not included in these treaties as in bilateral functional treaties and compromis. But the formula of amiable compositeur is provided in some bilateral general arbitration treaties, and could perhaps produce much the same effect as those mentioned phrases do.

Clauses of the bilateral treaties of a functional nature raise a few points of note. The first is that the

ex aequo et bono formula is rarely used in these treaties, as compared with bilateral general arbitration treaties. Secondly, the "consideration of relevant or special circumstances" formula is included in some of these treaties, while it does not appear in the general arbitration treaties. Perhaps this would imply that while general arbitration treaties are intended for unspecified disputes which may arise between the parties, functional treaties have their respective specified subject-matters which correspondingly restrict disputes that may arise within certain limits. It would be for this reason that the "relevant or special circumstances" of the dispute can be taken into account in its settlement. Providing for such consideration simply does not make sense in general arbitration treaties. Thirdly, some clauses in these treaties have provisions for the tribunal to decide its rules of procedure "in accordance with justice and equity" or by itself or observe the rules of procedure of the Hague Convention. Although this is admittedly a procedural aspect of dispute settlement, equitable considerations in it could lead on to like considerations in the tribunal's deliberation on the merits of the case before it.

No marked differences seem to exist between general arbitration and functional treaties on the one hand and special agreements on the other in so far as expressions of the basis of decision are concerned. It would be nevertheless worth pointing out that special agreements or compromis have more particularized expressions for the basis of decision than general arbitration treaties or functional treaties, since they are drawn up for the very purpose of setting disputes which have arisen under certain specific circumstances. Thus Articles 5, 6 and 7 of the Jay Treaty had "according to evidence", "according to justice and equity" and "according to the merits of the several cases and to justice, equity and the law of nations" for the basis of decision to suit the respective categories of territorial, damages and maritime seizure cases.

In the compromis for claims cases there are just a few

clauses providing that "all relevant matters" should be taken into account in the decision by the tribunal. In one such clause, Article 6 of the Jay Treaty where the "Commissioners" were to decide on claims for damages, the "justice and equity" formula was accompanied by a phrase "according to the merits of the several cases, due regard being had to all the circumstances thereof". Another such clause, Article 4 of the Canadian-United States compromis for the Trail Smelter case, stipulates that the tribunal should, in the application of the American and international law and practice followed in cognate questions, "give consideration to the desire of the High Contracting Parties to reach a solution just to all parties concerned." Secondly, noticeable is an "absolute equity" formula. In the series of ten compromis of 1903 between Venezuela and the ten Euro-American States to recover the losses incurred during the post-independence civil war in Venezuela, a clause was inserted providing for the basis of decision in terms of "absolute equity" to the exclusion of legal considerations. Likewise in the series of Mexican compromis with the six Euro-American States to settle by arbitration claims for damages arising out of the revolution in Mexico, a "justice and equity" or "equity" basis of decision was laid down to the exclusion of legal remedies. Thirdly, there are some clauses providing for the rules of procedure of the tribunal to be decided according to justice and equity or to the Hague Convention.

By contrast, compromis on territorial and boundary cases have no such clause laying down that the tribunal's rules of procedure should be decided according to any standards or principles. A second point to make is that there is not a wide variety of general verbal expressions, like "justice and equity", in the clauses of the basis of decision. Perhaps the most noticeable is the comparatively large number of "equitable solutions" or its equivalent, followed by "consideration of the special or relevant circumstances" and "law and equity" in their particularized wordings. The more individualized or particularized the given expressions are to suit the peculiarities of the

case, the more specific, although limited, guide the arbitrator or tribunal has in deciding the case. The "needs", "conveniences" and "interests" of the population or area concerned are examples.

As has been seen above, the basis of decision in certain verbal expressions provided in compromis does not seem to be essentially different from that in general arbitration treaties or functional treaties. What is important is how a given basis of decision is applied. This must be verified by an analysis of arbitral awards in which the tribunal's mode of application of an equitable basis of decision may be seen. For the purpose of verification, analysis could conveniently be made of arbitral awards of territorial and boundary cases. This convenient choice of territorial and boundary disputes arbitrations is due primarily to the gravity of those arbitrations as compared with claims cases where normally the interests of the individual are concerned. Its justification may also be found in the comparatively small number of territorial and boundary arbitrations, when compared with the literally innumerable arbitrations of claims for damages.

Chapter III

Arbitrations of Territorial and Boundary Disputes

In this Chapter it is proposed to see how the equitable basis of decision provided in a special agreement (compromis) is applied in the arbitration of a particular case. It is also proposed to examine how some cases are decided in an equitable manner although their compromis lay down a legal basis of decision. This examination includes not only arbitrations of territorial and boundary disputes but those of cases involving territorial jurisdiction in one way or another. In view of their theoretical, as well as practical, importance, some recent cases of maritime boundary delimitation and jurisdiction are also taken up for analysis. The inclusion of these cases should be justified in the light of a finding of the International Court of Justice in its judgment in the Aegean Sea Continental Shelf case (Jurisdiction of the Court) of 1978:

"Whether it is a land frontier or a line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, ..."1)

The present Chapter is divided into three main Sections. In the first two Sections equitable considerations are analyzed with respect to, first, procedural matters, and secondly, substantive matters. An attempt will be made in the third Section to summarize the main points of such considerations.

1. Equitable Considerations in Procedural Matters

Some tribunals have shown considerations of an equitable nature, which have no express basis in the compromis, before proceeding to decide on the merits of the case. While they only relate to the procedural aspect, they in fact have some impact on the subsequent findings of

the tribunal on questions of substance. Logically it is small wonder that this should be so; it would be illogical that the tribunal's reasoning should have a gap between matters of procedure and substance.

(1) Tribunal's liberty of accepting and collecting evidence

In the Island of Palmas case of 1928, a case before the Permanent Court of Arbitration, the sole arbitrator, Max Huber, states that in the proceedings falling within the scope of the Hague Convention for the Pacific Settlement of International Disputes of 1907, the provisions of the Convention should serve as subsidiary law at least to construe the compromis. Thus he holds:

"This liberty of accepting and collecting evidence guarantees to the tribunal the possibility of basing its decisions on the whole of the facts which are relevant to its opinion."²⁾

He makes a further point on his latitude to appreciate the pleadings:

"The authorization given to the Arbitrator by Article III of the Special Agreement to apply to the Parties for further written Explanations would be extraordinarily limited if such explanations could not extend to any allegations already made and could not consist of evidence which included documents and maps. ... It is for the Arbitrator to decide both whether allegations do or--as being within the knowledge of the tribunal--do not need evidence in support and whether the evidence produced is sufficient or not; and finally whether points left aside by the Parties ought to be elucidated. This liberty is essential to him, for he must be able to satisfy himself on those points which are necessary to the legal construction upon which he feels bound to base his judgment. He

must consider the totality of the allegations and evidence laid before him by the Parties, either motu proprio or at his request and decide what allegations are to be considered as sufficiently substantiated."3)

That is the way the arbitrator identifies his discretion to deal with the pleadings. His two preliminary points of the "liberty of accepting and collecting evidence" and the need to "consider the totality of the allegations and evidence laid before him" would seem to suggest that he is willing to evaluate the claims and supporting evidence of the parties in as comprehensive a manner as possible. In this sense such equitable considerations for procedural matters could presumably, if not necessarily, lead on to similar considerations with respect to the merits of the case.

Similarly, the tribunal's latitude to choose a third line is clarified before it proceeds to discuss the merits of the case in the Indo-Pakistan Western Boundary (Rann of Kutch) case of 1968. Although it is not identified by the tribunal itself but by the parties subsequently to the compromis of 1965, the extended powers of the tribunal would have provided it with wider discretion. The Award states in its introduction:

"Both Parties agree that, should the Tribunal find that the evidence establishes that the disputed boundary between India and Pakistan lies along a line different from the claim lines of either Party, the Tribunal is free to declare such a line to be the boundary."4)

The authorization of the tribunal to act with such extended powers would be in line with the identification of the applicable law of this arbitration. For, when the question arose during the meetings of the tribunal in February, 1966 as to whether the compromis conferred on the tribunal the power to decide the case ex aequo et bono, it decided that it had no such power as the parties had not by any subsequent agreement consented thereto, but it decided on

the other hand that "equity forms part of International Law; therefore, the Parties are free to present and develop their cases with reliance on principles of equity."⁵⁾

The Fisheries Jurisdiction case (merits) of 1974 is still another case in which a liberal interpretation was made of the competence of the International Court of Justice to ascertain the law applicable and consider the dispute in all its aspects. Thinking it its duty, rather than that of the parties, to ascertain and apply the relevant law in the given circumstances of the case, "the Court has had cognizance not only of the legal arguments submitted to it by the Applicant but also of those contained in various communications addressed to it by the Government of Iceland, and in documents presented to the Court." It was also assisted by the oral and written answers given by the Applicant in reply to the questions asked by the members of the Court during the oral proceedings and thereafter.⁶⁾ The Court further stressed the need to see the case in a broad perspective and take account of "all relevant elements":

"Furthermore, the dispute before the Court must be considered in all its aspects. Even if the Court's competence were understood to be confined to the question of the conformity of Iceland's extension with the rules of international law, it would still be necessary for the Court to determine in that context the role and function which those rules reserve to the concept of preferential rights and that of conservation of fish stocks. Thus, whatever conclusion the Court may reach in regard to preferential rights and conservation measures, it is bound to examine these questions with respect to this case. Consequently, the suggested restriction on the Court's competence not only cannot be read into the terms of the compromissory clause, but would unduly encroach upon the power of the Court to take into consideration all relevant elements in administering justice between the Parties."⁷⁾

Those considerations of a preliminary nature are to lead on to some equitable considerations on the substantive matters, as we shall see later.

(2) Acceptance of additional documents during the preliminary phase

In the Argentine-Chile Frontier case of 1966, the President of the Court of Arbitration gave an equitable warning to Argentina on what would otherwise have turned out an unfavourable position of her. In his Note of 15 December 1965 the President of the Court stated as follows:

"The Court notes that every extensive information on land use, which is essential to complete the geographical picture, has been received from Chile but little such information has been received from the Argentine Republic. ... [W]ill the Agent for the Government of the Argentine Republic suggest ways of overcoming this difficulty?"⁸⁾

At the occasion of the preliminary oral hearings, which took place between 29 and 31 December 1965, the Agent for Argentina explained that

"in his Government's view acts of the Parties on the ground were legally irrelevant to the determination of the question submitted to the Court by the Compromiso. Notwithstanding this reservation he suggested that his Government be allowed to file with the Court, on or before 14 January 1966, a Memorandum on Land Use."⁹⁾

After considering the matter,

"the Court authorized both Parties to submit, not later than noon on 14 January 1966, supplementary memoranda containing such further information relating to land use, settlement and circulation of local trade as they might desire. The Court declared that it was

understood that the deposit of this information should be without prejudice to the question of its legal relevance, which question the Parties might deal with in the Counter-Memorials."¹⁰⁾

As a result of this advice, the Argentine Government filed on 14 January 1966 a "Memorandum on Land Use, Settlement and Circulation of Local Trade".¹¹⁾ That the advice of the President of the Court was an equitable consideration of a procedural nature was in a sense confirmed by the Court itself, when it stated later in the Award:

"Although the Court--for reasons which will be explained below--shares Argentina's view that the reference to interpretation and fulfilment in the Compromiso is intended to mean interpretation and fulfilment by the Court rather than by the Parties, the Court has not taken the view that 'the fulfilment material' submitted by either side ought to be excluded as completely irrelevant. This is because, in the Court's opinion, such evidence is relevant to the question of settlement--whether for instance what was settled in 1902-03 has since become unsettled or has settled in a different way, and whether too 'the fulfilment material' throws any light on the question whether what was left unsettled in 1902-03 has since become settled."¹²⁾

A similar equitable consideration of a procedural nature may be found in the arbitration of 14 February 1985 between Guinea and Guinea Bissau on the maritime boundary delimitation. The question arose in connection with the tribunal's examination of the travaux préparatoires of a relevant boundary treaty between France and Portugal, the former colonial powers of the parties.

By their compromis of 18 February 1983 the parties requested the tribunal to decide on three questions the second of which ran:

"Quelle valeur juridique peut-on attribuer aux protocoles et documents annexes de la convention de 1886 pour l'interprétation de ladite convention?"¹³⁾

This is supplementary to the first request as to whether the 1886 convention on the land boundary determines the maritime boundary as well. The award states:

"Comme il est indiqué au paragraphe 39 ci-dessus, les travaux préparatoires de la convention de 1886 consistent essentiellement en protocoles numérotés de 1 à 12 et assortis d'annexes diverses qui contiennent le procès-verbal des réunions franco-portugaises tenues à Paris du 22 octobre 1885 au 12 mai 1886. On peut utilement y ajouter les notes et dépêches diplomatiques annexées par les Parties à leurs mémoires et, bien que cela ne fasse pas partie stricto sensu des travaux préparatoires, les documents qui ont été fournis l'année suivante aux Parlements français et portugais en vue de la ratification de la convention et qui ont été remis par les Parties au Tribunal sur sa demande."¹⁴⁾ (Emphasis added)

At its first meeting the tribunal had decided to use the same rules of procedure as those of the Rules of Court of the International Court of Justice, particularly Articles 30-31, 49-50, 52, 54, 56-58, 60-68, 71-72, 94-95 and 98 mutatis mutandis.¹⁵⁾ Indeed the above-mentioned course of action coincides with the provisions of Article 56, paragraph 2, of the Rules of Court. For Article 56 provides:

"1. After the closure of the written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party or as provided in paragraph 2 of this Article.
...

2. In the absence of consent, the Court, after hearing the parties, may, if it considers the

document necessary, authorize its production."

It is not quite clear whether the tribunal requested the parties to submit supplementary documents after the closure of the written proceedings, but the request for such documents would have been made for the same purpose as provided in Article 56, paragraph 2, of the Rules of Court.

At any rate what the tribunal did, could be understood as showing the willingness of the tribunal to ensure a most appropriate interpretation of the relevant boundary treaty. This may be seen in the manner in which the document concerned is examined for the use of the consideration of the merits. When discussing how the text of the treaty of 12 May 1886 was drafted, the tribunal stated:

"Le nouveau texte de l'article (= Article 1) fut adopté lors de la séance suivante du 10 avril 1886 (protocole n° 13) et annexé, après quelques modifications mineures et sans autre commentaire, au protocole de signature du 12 mai 1886 (n° 16). Il est conforme au texte ratifié reproduit au paragraphe 45 ci-dessus. En particulier le premier alinéa y est divisé en quatre alinéas non numérotés mais, dans la copie manuscrite en français conservée au ministère des affaires étrangères de France, les deuxième et troisième alinéas sont suivis de points-virgules et il y a encore un point-virgule à la fin du troisième alinéa dans un texte imprimé du projet de loi soumis au Parlement français. En revanche, dans la version bilingue imprimé pour le Parlement portugais, il n'y a plus de point-virgule et l'on a ainsi la ponctuation du texte qui sera ratifié."¹⁶⁾

(3) Examination of pleas of estoppel and the critical date

In the Argentine-Chile boundary arbitration of 1966, the Court of Arbitration would seem to have given equitable considerations in the examination of pleas of estoppel and the critical date as procedural matters.

With respect to estoppel, Chile put forward the contention that Argentina, "by her representations to Chile in her diplomatic Notes of 1913-15 regarding the course and source of the river whose mouth is opposite Post 16, was and still now is precluded from denying that the boundary follows the course of a channel which has its source in the vicinity of the Cerro Herrero." (Final Submission No. 33) To this Argentina replies that, by reason of a series of official Chilean maps issued between 1913 and 1952, Chile is precluded from putting forward her present contention that the boundary should follow the channel called by Argentina the Río Falso Engaño and that it should not follow the channel called by Argentina the Río Encuentro. In Argentina's view, Chile is also precluded by the same maps from arguing that the boundary should not pass through Cerro de la Virgen.¹⁷⁾

After an examination of the contentions of the parties, the Court concludes:

"Accordingly, the Court finds that no claim of estoppel is made out by either Party against the other, and that therefore both Parties are free without preclusion of any kind to put forward their respective contentions as regards the course of the boundary."¹⁸⁾

On the critical date the Court finds:

"In so far as the Court is asked to interpret and fulfil the Award of 1902, there is obviously a sense in which the critical date is 1902 itself--or at least 1903, the date of the demarcation. ... there is equally obviously a sense in which the critical date is the date of the submission of the dispute to the Arbitration, i.e., 1964.

"For these reasons, the Court has considered the notion of the critical date to be of little value in the present litigation and has examined all the evidence submitted to it, irrespective of the date of

the acts to which such evidence relates."¹⁹⁾

Thus the Court would seem to have sought to look at every possible relevant evidence and circumstance that may be submitted to it by the parties in regard to both the argument of estoppel and that of the critical date.

(4) Taking account of the spirit which guided the conclusion of the treaty

In the Lake Lanoux case of 1957, the tribunal was faced with the opposing interpretations by the French and Spanish Governments of the relevant treaties, with the French taking a textualist line and the Spanish interpreting them in a more liberal way. Since the question posed by the compromis was "uniquement relative au traité et à l'Acte additionnel de 1866", the tribunal thought it proper to deal with the matter of interpretation in a general and preliminary way. It says it will apply "les règles suivantes" in respect of each particular point:

"Les dispositions claires du droit conventionnel n'appellent aucune interprétation; le texte traduit une règle objective qui saisit la matière à laquelle elle s'applique; quand il y a matière à interprétation, celle-ci doit être opérée selon le droit international; celui-ci ne consacre aucun système absolu et rigide d'interprétation; il est donc permis de tenir compte de l'esprit qui a présidé aux traités pyrénéens, ainsi que des règles du droit international commun."²⁰⁾

It would appear to have struck the balance between the two suggested methods of interpretation, as Françoise Duléry points out in her comment on this case:

"Le Tribunal a résolu cette difficulté par une argumentation extrêmement souple, qui s'apparenterait plutôt à la tradition des Commissions de conciliation

qu'à celles des Tribunaux arbitraux, en donnant à chacune des parties une satisfaction. Si, en effect, il paraît d'abord se ranger à la thèse française en déclarant la question posée par le compromis 'uniquement' relative au Traité et à l'Acte additionnel de 1866, se conformant en cela à la jurisprudence de la Cour permanente de Justice internationale (arrêt des prises d'eau à la Meuse), il n'en ajout pas moins que, dans l'interprétation de ces textes, quand ceux-ci ne lui paraîtront pas clairs, 'le droit international ne consacrant aucun système absolu et rigide d'interprétation, il est permis de tenir compte de l'esprit qui a présidé aux Traités pyrénéens, ainsi que des règles du droit international commun'. Il aboutit en fait à se réserver la faculté de se référer aux principes du droit international commun, quitte, dans la forme, à les appliquer à chaque article de l'Acte additionnel au lieu de les appliquer in abstracto."21)

The tribunal has made this clarification of its position on interpretation at the outset of the discussion of the legal issues. Its somewhat conciliatory attitude in the preliminary and procedural matter, it is submitted, foreshows its subsequent equitable manner of dealing with the merits of the case.

2. Equitable Considerations in Substantive Matters

It is needless to say that each territorial or boundary arbitration, like any other kind of arbitration, is sui generis with its own peculiarities of historical, political, economic and cultural backgrounds and implications. Consequently, analysis for equitable factors could be made of one case after another, or it could be made on the basis of some categorized subjects of equitable considerations as follows. The latter approach is taken because it could hopefully serve better to identify what are equitable principles and considerations that conduce to

equitable settlement of disputes.

As has been seen before, equity is connected with law in some way: it is considered as forming part of law in the majority of cases, and occasionally as filling the gap of law or as being applicable even in defiance of law. It would be well, therefore, to follow these categories of law-equity relationship in the analysis of equitable factors that may be found in the arbitrations.

(1) Equitable considerations infra legem

1) Very careful weighing on legal bases of the claims and supporting evidence of the parties

In the Island of Palmas case of 1928 between the Netherlands and the United States, the arbitrator was placed under a strict request for the determination of "whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory."²²⁾ In other words,

"since, according to the terms of its Preamble, the agreement of January 23rd, 1925, has for its object to 'terminate' the dispute, it is the evident will of the Parties that the arbitral award shall not conclude by a 'non liquet', but shall in any event decide that the island forms a part of the territory of one or the other of two litigant Powers."²³⁾

Thus the arbitrator stood on the recognition that in so far as "the evidence produced as regards sovereignty over a territory in the circumstances of the island in dispute might prove not to be sufficient to lead to a clear conclusion as to the existence of sovereignty",²⁴⁾ the only possibility open to him was "to found his decision on the relative strength of the titles invoked on either side".²⁵⁾ Since he was mandated to decide the case "in accordance with the principles of International Law and any applicable treaty provisions"²⁶⁾ and not allowed to deviate therefrom,

he had to compare the claims and supporting evidence of the parties on the basis of legal principles.

With respect to the United States claim to sovereignty over the island, the arbitrator holds that if it is derived from Spain by way of cession under the Treaty of Paris of 10 December 1898, the essential point is to decide whether Spain had sovereignty over the island at the time of the coming into force of the 1898 Treaty.²⁷⁾ On the United States claim, the arbitrator concludes:

"The United States base their claim on the titles of discovery, of recognition by treaty and of contiguity, i.e. titles relating to acts or circumstances leading to the acquisition of sovereignty; they have however not established the fact that sovereignty so acquired was effectively displayed at any time."²⁸⁾

The conclusion has been reached as a result of the rejection of the three claimed titles of the United States. An inchoate title, the most that the title of discovery could amount to, cannot prevail over a definite title founded on continuous and peaceful display of sovereignty. The title of contiguity, understood as a basis of territorial sovereignty, is rejected as having no foundation in international law. The title of recognition is held as inapplicable, because the rights of Spain to be derived from the Treaty of Münster of 1648 would have been superseded by those which were acquired by the Treaty of Utrecht of 1714. Further, "even if the Treaty of Utrecht could not be taken into consideration, the acquiescence of Spain in the situation created after 1677 would deprive her and her successors of the possibility of still involving conventional rights at the present time."²⁹⁾

So far as the Netherlands claim is concerned, the arbitrator proceeds to examine what they say "the title of peaceful and continuous display of State authority" is.

"The facts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas),

especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. ... It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights."³⁰⁾

But such facts are not, in the view of the arbitrator, to establish a full-fledged title, but merely an inchoate title. What is now left for the arbitrator to do is to compare the two inchoate titles.

"These facts at least constitute a beginning of establishment of sovereignty by continuous and peaceful display of State authority, or a commencement of occupation of an island not yet forming a part of the territory of a State; and such a state of things would create in favour of the Netherlands an inchoate title for completing the conditions of sovereignty. Such inchoate title, based on display of State authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery, especially if this latter title has been left for a very long time without completion by occupation; and it would equally prevail over any claim which, in equity, might be deduced from the notion of contiguity. ... If, as in the present instance, only one of two conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties, the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, in doubt, to

prevail over an interest which--supposing it to be recognized in international law--has not yet received any concrete form of development."³¹⁾

Thus on the ground of the "relative strength of the titles invoked by each Party" the arbitrator comes to the conclusion that the island forms in its entirety a part of Netherlands territory. When, further, all the evidence is taken into account that shows the unchallenged acts of peaceful display of Netherlands sovereignty in the period of 1700 to 1906, when the dispute arose, the conclusion is reinforced with greater force.³²⁾

The arbitrator has very carefully weighed the claims and titles of the parties on the recognition that inasmuch as there is no treaty between the parties which clearly establishes the attribution of the island, there is no other way than to examine other facts to see which party can establish territorial sovereignty over the island.³³⁾ But such careful weighing of claims and titles was not performed in disregard of law, but would presumably have exercised what Dr. Huber defined elsewhere a few years later as the function of "l'équité régulatrice du droit".³⁴⁾ In this sense the view of Dr. Charles de Visscher would be shared with much sympathy when he states:

"Cette mise en balance de considérations équitables fournit une importante contribution au rôle de l'équité dans les attributions de territoires."³⁵⁾

The Legal Status of Eastern Greenland case of 1932, decided by the Permanent Court of International Justice, may be understood to have shown as careful a balancing of the claims and evidence of the parties as the Island of Palmas case. By way of a general observation the Permanent Court of International Justice states:

"In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the

sovereignty, and the tribunal has had to decide which of the two is the stronger. ... It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries."³⁶⁾

With such a situation in view, the Court embarks upon a careful weighing of the claims and evidence of the parties. The way the Court examines them, discussing their legality and opposability on the basis of Article 38, paragraph 1, of its Statute, is strictly legal. But the very way of detailed discussion or testing the relevant claims of one party against those of the other could perhaps be said to be another instance of fair and equitable considerations.

A similar careful weighing of claims and evidence of the parties may be seen in the Indo-Pakistan Western Boundary (Rann of Kutch) case of 1968. The tribunal was to decide the case "in the light of [the] respective claims and evidence produced before it",³⁷⁾ but when the question arose during the preliminary hearings in February, 1966 as to whether the tribunal was empowered to decide ex aequo et bono, the tribunal concluded that it was not so empowered, while confirming with the parties that equity forms part of international law.³⁸⁾

The tribunal was aware that "the territorial dispute which the Tribunal is called upon to decide does not differ in essence from other like disputes in which opposing claims have been made in reliance upon conflicting testimony, and where a judgment has to be rendered on the relative strength of the cases made out by two parties."³⁹⁾ The award, or the Opinion of the Chairman to which the arbitrator chosen by Pakistan acceded, determines the disputed region in these words:

"Reviewing and appraising the combined strength of the evidence relied upon by each side as proof or indication of the extent of its respective sovereignty in the region, and comparing the relative weight of such evidence, I conclude as follows. In respect of those sectors of the Rann in relation to which no specific evidence in the way of display of Sind authority, or merely trivial or isolated evidence of such a character, supports Pakistan's claim, I pronounce in favour of India. These sectors comprise about 90 per cent of the disputed territory. However, in respect of sectors where a continuous and for the region intensive Sind activity, meeting with no effective opposition from the Kutch side, is established, I am of the opinion that Pakistan has made out a better and superior title. This refers to a marginal area south of Rahim ki Bazar, including Pirol Valo Kun, as well as to Dhara Banni and Chhad Bet, which on most maps appear as an extension of the mainland of Sind."⁴⁰⁾

Indeed that conclusion was reached after a very detailed examination of historical facts, surveys and maps, relevant documents, reports, acts of jurisdiction, etc. in respect of almost all parts of the disputed territory.⁴¹⁾ Such assessment of the award is shared by J. J. A. Salmon who aptly states:

"Cette technique d'exposition est peut-être le reflet du souci du Président de ménager la susceptibilité des parties; elle est aussi le signe évident de l'équité, du sens de la justice."⁴²⁾

Much the same careful weighing of evidence is conducted, but for a different purpose, in the Beagle Channel case of 1977.⁴³⁾ The Court of Arbitration presents a detailed review of the evidence submitted to it with a view to confirming what it has already found from a strictly legal, that is constructionist, approach in

interpreting the Argentine-Chile boundary treaty of 1881. In this sense the consideration of "corroborative or confirmatory incidents and material" is only secondary to the decisive textualist interpretation.⁴⁴⁾

But it may be defended as the right course of action for the Court, for the very reason that it was intended for the confirmation, and hence strengthening, of the Court's conclusion reached through an abstract-logical approach to treaty interpretation. Also it may be called an equitable approach since it has squarely responded to all that the Parties submitted to the Court for consideration.

Whether it is the tradition of Angle-Saxon judicial practice, as a commentator says it is,⁴⁵⁾ the conscientious review of the evidence may well be due to the thoughtful initiative of the President of the Court. For, on a later occasion Sir Gerald Fitzmaurice expressed his conviction of the importance of consideration for the litigant parties and especially the losing party:

"States and parties in the international field--entities which are proud, sensitive, and always to some extent at the mercy of their own domestic public opinion--disposed also to be distrustful of legal procedures--need to be given the feeling that their arguments have been adequately considered and above all, understood--so that they have something to show for the risks they have taken in going to law."⁴⁶⁾

This attitude would seem an equitable consideration in so far as it is intended for an equitable settlement of the dispute, the primordial objective of the settlement of disputes.⁴⁷⁾

2) By reason of historical right, of equity and of a geographical nature

A case of equitable, as well as legal, considerations may be seen in the Honduras-Nicaragua boundary arbitration of 1906. The compromis or Bonilla-Gamez Treaty of 7

October 1894 does not specify any basis of decision for the arbitral tribunal, but empowers the Mixed Boundary Commission to settle "all pending doubts and differences" "in a friendly manner" (Article I), "equitably" to determine the boundary line as a result of consulting the maps and public and private documents, geographical or otherwise (Article II, paragraph 5) and to grant, if it deems it appropriate, "compensations and even fix indemnities in order to establish, in so far as possible, a well-defined, natural boundary line" (Article II, paragraph 6).⁴⁸⁾ The disputed point or points of the boundary line which the Mixed Commission failed to settle were to be submitted to an arbitral tribunal for final solution (Article III).⁴⁹⁾ The Mixed Commission having succeeded in fixing the boundary line from the Pacific coast to Portillo de Teotecacinte, the determination of the remaining part of Portillo de Teotecacinte to the Atlantic coast fell upon the arbitral tribunal which turned out the King of Spain.⁵⁰⁾

In choosing Cape Gracias á Dios as the boundary on the Atlantic coast, the arbitrator, after examining the relevant acts and documents, states:

"from what is inferred from all the foregoing, the point which best answers the purpose by reason of historical right, of equity and of a geographical nature, to serve as a common boundary on the Atlantic coast between the two contending States, is Cape Gracias á Dios for the Atlantic coast, and further, as this Cape fixes what has practically been the limit or expansion or encroachment of Nicaragua towards the north and of Honduras towards the south."⁵¹⁾

If that is a more legal decision, an equitable "compensation" is attempted in awarding the bay and town of Cape Gracias á Dios to Nicaragua:

"... whilst, on the other hand, and as compensation for having taken the mouth of the Segovia in the

manner previously mentioned, the bay and town of Cape Gracia á Dios remain within the domain of Nicaragua, which, according to facts beyond dispute and with a greater right, would correspond to Honduras; ..."⁵²⁾

The International Court of Justice, in its judgment of 18 November 1960 in the case concerning the Arbitral Award by the King of Spain on 23 December 1906, comments that the award as a whole has given "all relevant considerations":

"However, an examination of the Award shows that it deals in logical order and in some detail with all relevant considerations"⁵³⁾

3) Equitable interpretation of treaty provisions

a) Most reconciliatory interpretation of the documents which present no desired clarity of the case

In the Colombia-Venezuela boundary case of 1891 decided by the Queen of Spain, the arbitrator gave equitable interpretations of the relevant documents. The original compromis or "Traité d'Arbitrage 'juris'" of 14 September 1881 provided that the arbitrator should act "en qualité d'arbitre Juge de droit",⁵⁴⁾ but an additional "Acte de Paris" of 15 February 1886 extended his powers in these terms:

"l'arbitre ... pourra fixer la ligne de la manière qu'il croira la plus rapprochée des documents existants, lorsque, dans l'un ou l'autre point de la dite ligne, ils ne présenteront pas toute clarté voulue."⁵⁵⁾

Basing herself upon this enlarged power of decision, the arbitrator proceeds to determine Section 5 of the six Sections into which the disputed territory was divided, on the ground that the relevant document raises doubts:

"Considérant que la Cédule Royale de création de la Commandance de Barinas du 15 février 1786 qui doit servir de base légale pour la détermination de la ligne de frontière de la cinquième section, suscite des doutes en ce qu'elle cite des lieux inconnus aujourd'hui, savoir: las Barrancas del Sarare et le Paso Real de los Casanares;

Considérant que pour cette raison l'Arbitre se trouve dans l'un des cas prévus dans l'Acte-déclaration de Paris de 1886, suivant lequel il doit fixer la ligne frontière de la manière qu'il estime la plus rapprochée des documents existants".⁵⁶⁾

The award finds similarly on the second part of Section 6:

"Considérant que les termes de la dite Cédule Royale ne sont pas aussi clairs et précis que l'exige cette sorte de document pour pouvoir fonder exclusivement sur eux une décision juris;

Considérant, par conséquent, que l'Arbitre se trouve dans le cas prévu dans l'Acte-déclaration de Paris déjà cité."⁵⁷⁾

b) Equitable interpretation of the text so as to give practically significant effect to it

In the Walfish Bay case of 1911 in which Germany and Great Britain disputed the southern boundary of the enclave within German territory, an equitable interpretation was placed on a relevant document. Because of the silence of the compromis or "declaration" of 30 January 1909 on the applicable law, the arbitrator determined it in this way: the two fundamental questions which he defined "must be solved in conformity with the principles and positive rules of public international law, and where they fail, in conformity with the general principles of law, since neither the said Agreement of 1890 nor the supplementary Declaration of Berlin of the 30th January, 1909, in any way authorize the arbitrator to base his decision on other

rules, and it is notorious, according to constant theory and practice, that such authority cannot be presumed".⁵⁸⁾ In a word he denies the applicability of extra-legal principles.

The question at issue is the meaning of the phrase "including the plateau" in the Proclamation of 12 March 1878 which Captain Dyer of the Industry issued in the name of Her Majesty the Queen of Great Britain and Ireland in taking possession of the port and station of Walfish Bay and of certain adjacent territory. The annexed district was bounded as follows:

"On the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppman's Dorp; on the east by a line from Scheppman's Dorp to Rooibank, including the plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the Swakop River".⁵⁹⁾ (Emphasis added)

At the time of annexation, Captain Dyer would seem to have gone beyond the instructions to annex the "plateau". On 24 April 1889 when he was invited by the British Government to furnish a new report, in reply to the observation and arguments formulated by the German member of the mixed commission which had signed separate reports in January 1889, he testified that his initial intention had been to annex the Walfish Bay strictly in accordance with the terms of telegram of the Governor to Captain Mills on 22 February 1878.⁶⁰⁾ But a conversation with Mr. Ryder, representative of Ericsson & Co. of Capetown, and others, as his memorandum of 12 March 1878 addressed to Commodore F. W. Sullivan, explains, "as there was no fresh water nor pasture in Walfish Bay", he considered it indispensable that there should be included in the annexation, if possible, a place containing both these things. With this object "he made a journey in bullock-wagon to Rooibank ... to view the plateau" which was "the nearest point available to supply the Bay with water and good pasture".⁶¹⁾

In examining the evidence, the arbitrator felt the German evidence rather weak for not being based on personal or first-hand knowledge of the annexation whereas he gave some credence to the British evidence.⁶²⁾ Thus he decides in favour of the British contention on what the "plateau" means in Mr. Dyer's phrase, "including the plateau".

"... the whole plateau ... is pastureland with plenty of water, since there exist or have existed to the east of the church at Scheppmansdorf wells and gardens, also a large area covered with 'quickgrass' ... and a considerable number of trees which afford, in addition to fuel, valuable fodder for cattle, such as the anna--circumstances which, if taken in conjunction with the obvious intention of Mr. Dyer to provide water and good pasture for the station of Walfish Bay and with the fact of his having been advised in this matter by persons knowing the locality, render any interpretation difficult which would result in this grazing ground being divided, since in the conception of this word, as in the conception of 'plateau', there is a sense of unity whose division in case of doubt cannot be presumed."⁶³⁾

The arbitrator concludes:

"... the prolongation of the plateau of pastures Scheppmansdorf to Ururas explains satisfactorily the terms of the proclamation of the 12th March, 1878, because, as Scheppmansdorf was therein indicated as the limit of British territory and the name was known to be somewhat vague, inasmuch as it applied to land extending some miles, it was necessary to add something to make the frontier precise; and this necessity was the origin of the use of the words 'including the plateau', by which it was desired to indicate beyond doubt, in the only possible way, as there were no maps, that the boundary would have to be

laid down, not at the beginning nor in the middle of the lands of Scheppmansdorf, but where its pastures terminate, and with them the plateau whose annexation was desired."⁶⁴⁾

Basing himself on legal principles, the arbitrator first made a grammatical examination of the word "plateau" as described by Captain Dyer, but later took account of the requirement of a "topographical unity" or indivisibility of the plateau, which seemed to him to accord with the object and purpose of Captain Dyer's action.⁶⁵⁾

A similar equitable interpretation of a certain term of the treaty in question was supplied in the North Atlantic Coast Fisheries case of 1910. When dealing with the definition of a "bay" in connection with Question 5, the tribunal presented a notable theory of treaty interpretation taking account of "all the individual circumstances":

"The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general."⁶⁶⁾

c) Considerations to give the best interpretation of the intention of the diplomatic instruments

In the Argentina-Chile boundary case of 1902, the tribunal adopted the boundary line which it judged would best interpret the intention of the relevant diplomatic instruments. Under the compromis of 17 April 1896 the arbitrator was to "apply strictly" the Boundary Treaty of

1881 and its Additional and Explanatory Protocol of 1893,⁶⁷⁾ but the tribunal which was appointed by the arbitrator found it impossible because those agreements were susceptible of diverse and opposite interpretations. This is how the tribunal came to place an equitable interpretation on the documents:

"In short, the orographical and hydrographical lines are frequently irreconcilable; neither fully conforms to the spirit of the Agreements which we are called upon to interpret. It has been made clear by the investigation carried out by our Technical Commission that the terms of the Treaty and Protocols are inapplicable to the geographical conditions of the country to which they refer. We are unanimous in considering the wording of the Agreements as ambiguous, and susceptible of the diverse and antagonistic interpretations placed upon them by the Representatives of the two Republics.

"Confronted by these divergent contentions we have, after the most careful consideration, concluded that the question submitted to us is not simply that of deciding which of the two alternative lines is right or wrong, but rather to determine--within the limits defined by the extreme claims on both sides--the precise boundary-line which, in our opinion, would best interpret the intention of the diplomatic instruments submitted to our consideration."⁶⁸⁾

d) Consideration of special circumstances in the interpretation of treaty provisions

One of the two main areas in which equitable considerations were given in the Anglo-French Continental Shelf case of 1977 is the applicable law. The compromis of 10 July 1975 lays down the basis of decision as "the rules of international law applicable in the matter as between the Parties".⁶⁹⁾ In interpreting Article 6 of the Convention on the Continental Shelf of 1958, however, the

Court of Arbitration reveals an equitable approach to treaty interpretation. According to the travaux préparatoires of Article 6 in the International Law Commission and at the Geneva Conference of 1958, the Court says, the "special circumstances" condition was introduced to avoid an unreasonable or inequitable delimitation of the continental shelf which the application of the equidistance principle may not infrequently lead to because of particular geographical features or configurations.⁷⁰⁾ The Court concludes:

"In short, the rôle of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistance-special circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles."⁷¹⁾

The International Court of Justice has shown a similar approach to treaty interpretation, though by way of an obiter dictum, in the Aegean Sea Continental Shelf case (Jurisdiction) of 1978. Greece rested its case for the Court's jurisdiction on the General Act for the Pacific Settlement of International Disputes of 1928, as well as on the joint communiqué of Brussels of 31 May 1975, and the question arose whether the present dispute fell under reservation (b), one of the two reservations which Greece made in acceding to the General Act in 1931, which is worded as follows:

"(b) disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication".⁷²⁾

The real question for decision, preliminary to the determination as to whether the present dispute falls within the scope of reservation (b), in the opinion of the Court, is whether the dispute relates to the territorial status of Greece.⁷³⁾ In this sense the Court takes a broad contextual approach in contrast to the linguistic argument of the Greek Government:

"No doubt, it is true the expression territorial status is commonly used in international law with reference to a legal condition or régime of a territory; but although the expression, as Article 39, paragraph 2, of the General Act itself indicates, denotes a category or concept covering clearly specified subject-matters, it is not an expression which can be said to have rigid legal connotations. On the contrary, the Court considers it to be a generic expression which comprises within its meanings various legal conditions and relations of territory. The answer to the question whether any given matter is properly to be considered as relating to the territorial status of a State must, therefore, depend on the particular circumstances of the case."⁷⁴⁾

e) Intentions of the parties ascertained from treaty provisions in the light of all the circumstances

The International Court of Justice says that the intention of the parties to a treaty must be ascertained from its provisions in the light of all the circumstances in the Frontier Land case of 1959. In examining the Netherlands contention, her first alternative contention, that the Boundary Convention of 8 August 1843 is vitiated by mistake, the Court states:

"The Netherlands contends however that it need not establish the origin of the mistake, since a simple comparison between the copy of the Communal Minute produced by it and that appearing in the Descriptive Minute reveals sufficiently that a mistake occurred.

The matter is not, however, capable of being disposed of on this narrow ground. The Court must ascertain the intention of the Parties from the provisions of a treaty in the light of all the circumstances."⁷⁵⁾

f) Liberal and detailed appreciation of alleged facts

In the Austria-Hungary boundary case of 1902 in which the boundary between the districts of Neumarkt (Austria) and Szepes (Hungary) in the vicinity of Lake "Meerauge" (in Hungarian "Halastó") in the Tatra mountains was disputed, a pair of national legislations constituted the compromis, which gave no basis of decision. Nor did the rules of procedure adopted by the tribunal in its initial meetings on 5 and 6 April 1902 specify it. But this is an equitable arbitration as the tribunal itself admits it.⁷⁶⁾

Starting with an examination of the Austrian arguments for a "dry" boundary and the Hungarian contentions of a "fluvial" boundary on the basis of the documents submitted to it, the tribunal fails to reach a decisive conclusion. A review of "les faits ultérieurs" invoked by the parties does not lead to any conclusion nor to a finding of "possession immémoriale".⁷⁷⁾ Under these circumstances the tribunal, basing itself on the position that "la démarcation de la frontière litigieuse était abandonnée à sa libre appréciation, tous les faits allégués ayant été minutieusement examinés",⁷⁸⁾ proceeds to deal with the question of "frontière naturelle". Thus the tribunal finds:

"Dans le cas présent, la frontière la plus naturelle semble être celle qui suit en remontant la rivière Bialka jusqu'à son origine, c'est-à-dire jusqu'au confluent des torrents du Fischsee et du Poduplasky et de là suit en remontant la crête des monts Zabie vers le plus haut sommet de la chaîne, c'est-à-dire la 'Meeraugenspitze'. L'Expert estime que toutes les anciennes descriptions de la frontière ... sont en harmonie avec le choix de cette frontière

naturelle."⁷⁹⁾

Such a boundary line would, in the opinion of the tribunal, be for the interests of both parties. The disputed territory, easily accessible from the side of Neumarkt (Austria), certainly has greater value for Austria than for Hungary,⁸⁰⁾ whereas a part of the forest which, from the material point of view, is certainly the most valuable part of the disputed territory is attributed to Hungary.⁸¹⁾ In this way the conflict in the region has now been minimized and the possibility avoided that the beautiful forest may be divided by a boundary line.⁸²⁾

In short, this is a case decided on the basis of equitable considerations, as the tribunal expressly says:

"On a ainsi tenu compte, pour des motifs d'équité et des considérations pratiques, dans le mesure du possible et dans le cadre de la configuration topographique, de la cohabitation pacifique des populations de la frontière et des intérêts de la Hongrie."⁸³⁾

4) Considerations concerning estoppel

a) Estoppel or preclusion from the previous arrangement, provided it is an equitable principle

In the Manica Boundary case of 1897 between Great Britain and Portugal, what would amount to the principle of estoppel was applied in respect of the conduct of one of the parties in the consideration of one of the three sections of the boundary line into which the disputed territory was divided conveniently by the arbitrator.

The basis of decision was the Treaty of 11 June 1891 between Her Britannic Majesty and His Majesty the King of Portugal defining their respective Spheres of Influence. The relevant portion of the treaty is:

"... Thence it follows the upper part of the eastern

slope of the Manica Plateau southwards to the centre of the Sabi, follows that channel to its confluence with the Lunte, ...

"It is understood that in tracing the frontier, along the slope of the plateau, no territory west of longitude 32°30' east of Greenwich shall be comprised in the Portuguese sphere, and no territory east of longitude 33° east of Greenwich shall be comprised in the British sphere. The line shall, however, if necessary, be deflected so as to leave Mutassa in the British sphere, and Massi-Kessi in the Portuguese sphere."⁸⁴⁾

It was understood, although not expressly written in the treaty, that the "règle fondamentale" was to attribute the "plateau" to Great Britain and the "pente" to Portugal. The drafters of the treaty admitted that this was a natural consequence and an essential condition.⁸⁵⁾ Thus, while formally following the law, the arbitrator was allowed some latitude for certain purposes.

In so far as the third and southernmost section of the arbitration area is concerned, it is important to take note of the fact that with a view to assuring Great Britain of the band of territory between the watershed line and the edge line of the eastern slope, Lord Salisbury proposed a compensation or indemnity of 18,000 to 60,000 square kilometres of territory in the north of the Zambezi to Portugal which accepted it (British memorial, No.17).⁸⁶⁾ The arbitrator refers to this transaction in finding Portugal estopped from taking any territory west of the longitude 32°30' east of Greenwich:

"Enfin, il ne faut pas oublier que la Grande-Bretagne, pour s'assurer que la frontière ne dépasserait le 32°30' vers l'ouest et n'irait jamais empiéter sa zone au delà de cette limite, a fait, comme nous avons plus d'une fois remarqué, la concession d'une large étendue de territoire au nord du Zambèze au Portugal pour le dédommager de la perte

qu'il aurait subie sur le plateau de Manica. Or, il serait contraire aux principes de justice que, sous un prétexte quelconque, le Portugal, en dépassant cette même limite, reprit une partie du territoire en échange duquel il a accepté la dite compensation. Il est vrai, qu'à l'égard de cette concession, ou, pour mieux dire, de cet arrangement, le Portugal devant l'Arbitre n'a manqué de soulever des exceptions, soit sur sa valeur, soit sur les droits de la Grande-Bretagne à l'égard de territoire cédé. Mais nous devons répéter, ce que nous avons déjà eu l'occasion d'observer, que le Portugal, après avoir accepté par le Traité ce territoire comme une compensation équitable, il n'est plus recevable à opposer des exceptions dont, au surplus, il n'a fourni aucune justification, s'étant borné à de simples allégations."⁸⁷⁾

If this is not an instance of strict application of the principle of estoppel or preclusion, the arbitrator would appear to be quite right in saying, "il serait contraire aux principes de justice que ... le Portugal ... reprit une partie du territoire en échange duquel il a accepté la dite compensation."

b) Diplomatic correspondence suffices to prevent the establishment of a title to territory

In the Chamizal case of 1911 between Mexico and the United States in which territorial sovereignty was disputed over a tract of land formed by repeated floods of the Rio Grande, the United States put forward as part of its contentions the plea of prescription or estoppel. In its counter-case the United States contended that it had acquired "a good title by prescription to the tract in dispute, in addition to its title under treaty provisions".⁸⁸⁾ In its argument it also contended that "the Republic of Mexico is estopped from asserting the national title over the territory known as 'El Chamizal' by reason of the undisturbed, uninterrupted and unchallenged

possession of said territory by the United States of America since the treaty of Guadalupe Hidalgo".⁸⁹⁾

The tribunal, acting "in accordance with the various treaties and conventions now existing between the two countries, and in accordance with the principles of international law",⁹⁰⁾ finds very controversial the question whether the right of prescription invoked by the United States is an accepted principle of the law of nations, and goes on to say:

"In January, 1867, Don Matias Romero forwarded Mr. Seward, Secretary of State, a communication from the prefecture of Brazos relating to the controversy between the people of El Paso del Norte (now Juarez) and the people of Franklin (now El Paso, Texas) over the Chamizal tract, then in process of formation. From that time until the negotiation of the convention of 1884, a considerable amount of diplomatic correspondence is devoted to this very question, and the convention of 1884 was an endeavour to fix the rights of the two nations with respect to the changes brought about by the action of the waters of the Rio Grande.

" ...

"It is quite clear from the circumstances ... that however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico cannot be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.

"... In the present case the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it commenced to exercise its functions, and prior to that date the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment.

"Under these circumstances the commissioners have

no difficulty in coming to the conclusion that the plea of prescription should be dismissed."⁹¹⁾

- c) Absence of protest may lead to a title to sovereignty, provided a protest is reasonably expected

In the Temple of Preah Vihear case (Merits) of 1962 before the International Court of Justice, the parties presented, in addition to arguments based on natural features such as rivers, mountain ranges, escarpments, etc., some arguments "of a physical, historical, religious and archaeological character", but the Court was unable to regard them as "legally decisive".⁹²⁾ Thus the Court would have meant to reject what might otherwise have been thought incidental equitable considerations. It concentrates on the principle of estoppel or preclusion and concludes:

"Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. ... It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it."⁹³⁾

The point is developed more extensively by Vice-President Alfaro in his separate opinion. Quoting an argument of Lauterpacht on estoppel, the Vice-President seems to think that Thailand was precluded by her failure to protest "in due course" from claiming title to sovereignty over the Temple region, and that such preclusion is equitable. Lauterpacht states in his paper on the continental shelf:

"... the far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability--a requirement even more important in the international than in other spheres; it is a precept of fair dealing inasmuch as it prevents states from playing fast and loose with situations affecting others; and it is in accordance with equity inasmuch as it protects a State from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very States."⁹⁴) (Emphasis added)

It is important, however, to note the proviso that the right to protest is to be exercised "in due course", as Alfaro rightly says, "the failure to reserve rights of which a State is legally possessed and which it is entitled to claim or exercise in due course ... may be and has been interpreted as a waiver of such rights."⁹⁵) (Emphasis added)

d) Silence or non-reaction not necessarily recognition of a claim to sovereignty

In the same case, two forceful contrary opinions were expressed by Judges Wellington Koo and Sir Percy Spender in their dissenting opinions. Their contentions are, in effect, that cultural and historical considerations should make the principle of estoppel or preclusion inapplicable.

On the incident of a visit of Prince Damrong of Thailand to the Temple in January, 1930 and the presence of the French Resident of the neighbouring Cambodian province of Kompong Thom on the scene in his official uniform with decorations and the appearance of the French flag on a pole in front of his own pavillian,⁹⁶) Judge Wellington Koo presents an interesting observation based on cultural-historical considerations. His opinion merits quotation in some detail:

"The display of his national flag by a foreign official, even by a private Occidental, was not an uncommon sight in an Asiatic country during that epoch; it may or may not have displeased the Prince. There was no clear cause for the Prince to make a protest at the time or to ask his Government to lodge one in Bangkok, though in the affidavit of one of his daughters who was with the Prince during this visit, it is stated that he privately considered the hoisting of the French flag at the place of their meeting and the donning of his official uniform by the French officer to be 'impudent'. The despatch of a letter of thanks and some photographs taken during this visit by Prince Damrong to the French Minister for transmission to the French authorities in Indo-China meant no more than a customary act of Oriental courtesy. In a word, the incident viewed in the light of the available evidence and the then prevailing conditions in Siam--and, in fact, in other parts of Asia--did not have the meaning and significance sought to be inferred from it.⁹⁷⁾

"The reason why 'he did not ask the Government to lodge a protest' was eloquently stated by his daughter, Princess Phun Phitsamai Diskul, who went with him during the visit to the Temple, to be as follows:

'It was generally known at the time that we only give the French an excuse to seize more territory by protesting. Things had been like that since they came into the river Chao Phya with their gunboats and their seizure of Chanthaburi.' In view of the history of the relations between Siam and French Indo-China at the time and earlier during the preceding decades, the Princess's explanation seems natural and reasonable. It was a situation not peculiar to Siam. It was, generally speaking, the common experience of most Asiatic States in their intercourse with the Occidental Powers during this period of colonial expansion."⁹⁸⁾

In more specific legal terms, he concludes on Thailand's acquiescence in Cambodia's claim to sovereignty over the Temple area:

"Moreover, there is no valid ground in law for holding Thailand accountable for acquiescence. The rule of Roman law that 'he who keeps silent is held to consent if he must and can speak' is, in my view, not applicable because the several occasions which are alleged to have been such as to call for a protest or reservation by her have been shown earlier to be entirely of a different character. Silence or failure to react, even when it constitutes a relevant factor, cannot alone be considered as implying recognition or acceptance of the other party's claim of sovereignty. ... In the case under consideration, no evidence has been adduced of any declaration or act by Siam or Thailand pointing clearly to her intention to recognize or accept Cambodia's claim of sovereignty over the Temple area."⁹⁹⁾

Judge Sir Percy Spender elaborates on the point in a similar way with, however, a clearer sense of intertemporal law:

"It is easy to fall into the error of judging the events of long ago by present day standards, indeed sometimes by standards which do not always have relation to real life.

"In determining what inferences may or should be drawn from Thailand's silence and absence of protest regard must, I believe, be had to the period of time when the events we are concerned with took place, to the region of the world to which they related, to the general political conditions existing in Asia at this period, to political and other activities of Western countries in Asia at the time and to the fact that of the two States concerned one was Asian, the other European. It would not, I think, be just to apply to

the conduct of Siam in this period objective standards comparable to those which reasonably might today be or might then have been applied to highly developed European States."¹⁰⁰⁾

Sir Percy refers to the same statement of Princess Phun Phitsamai Diskul that Judge Wellington Koo quotes, and concludes, after citing more supporting evidence,¹⁰¹⁾ on the Siamese apprehension about the aspirations of France:

"This apprehension on the part of Siam as to France's attitude towards her is a factor which cannot be disregarded in evaluating Siam's conduct--her silence, her lack of protest, if protest might otherwise have been expected of her."¹⁰²⁾

Further on the principle of preclusion, Sir Percy seems to deny the applicability of the principle in the present case:

"To accord to the concept of recognition by a State of a fact or situation, without more, the legal consequence of a preclusion not only finds, in my opinion, despite the views of certain writers, no authority as a principle of international law under Article 38 of the Statute of the Court, but provides an invitation to apply to the determination of a case in which recognition of a fact or of a situation is relied upon, considerations which are scarcely distinguishable from considerations ex aequo et bono.

"...

"In short, the evidentiary value of the recognition or acquiescence must be weighed against all the relevant evidence disclosed in the record."¹⁰³⁾

This last point, a summary statement of what he has said earlier about the Siamese position vis-à-vis France as evidenced in her lack of protest, is an equitable

consideration stressing the need to see an act, if passive, of a State in the light of all the relevant circumstances.

(2) Equitable considerations marginally infra legem

1) Consideration of particular circumstances of the case

a) Geographical conditions of the arbitration area

In the North Sea Continental Shelf cases of 1969, the forerunner of the recent judicial and arbitral decisions on the delimitation of continental shelf boundaries in which equitable considerations were given in one way or another, the International Court of Justice was faced with a situation where a State with a concave coastline lies between two adjacent States with convex coastlines. The focal point was whether the equidistance method of drawing the boundary line, a conventional rule and found in the end inapplicable as between the parties, would produce an equitable delimitation. This depends on the geographical conditions of the sea area concerned. The equidistance method, despite its known advantages, would, in the opinion of the Court, lead to inequity in this disputed part of the North Sea. The difficulty was two-fold in the words of the Court:

"(a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of

itself creative of inequity.

(b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unquestionably consists of continental shelf. A study of these convergences, as revealed by the maps, shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method."¹⁰⁴⁾

Such considerations result in the operative paragraph of the judgment in one of the three "factors to be taken into account" "in the course of the negotiations" of the parties to be conducted in accordance with the judgment of the Court. It is worded as follows:

"(1) the general configuration of the coast of the Parties, as well as the presence of any special or unusual features".¹⁰⁵⁾

This was not identified by the Court as a rule or principle of international law which should guide the negotiations of the parties, but as one of the factors to be taken into account in such negotiations. It is, however, an equitable factor in that it will be included in "all the relevant circumstance" as provided in the first of the two "principles and rules of international law" applicable to the delimitation in the present case.¹⁰⁶⁾

In the Anglo-French Continental Shelf case of 1977, too, the importance of taking account of the geographical conditions of the arbitration area was stressed: first in respect of the extraordinary location of the Channel Islands being very close to the French coast, and secondly in respect of the Atlantic region, i.e. west of the Scillies-Ouessant line, where the coasts of the parties are

considered by the Court of Arbitration to be "adjacent" or lateral, rather than "opposite".¹⁰⁷⁾ Since the Channel Islands region is to be discussed under separate headings below, the Atlantic region is conveniently taken up here.

The Court first identifies its basic position in general terms:

"The appreciation of the effect of individual geographical features on the course of an equitable line has necessarily to be made by reference to the actual geographical conditions of the particular area of continental shelf to be delimited and to the actual relation of the two coasts to that particular area."¹⁰⁸⁾

Specifically at issue in this region is the westward projection of the Cornish peninsula and the Isles of Scilly, or at least their greater projection than the westernmost coast of the French territory, i.e. Ile d'Ouessant.

"The projection of the Cornish peninsula and the Isles of Scilly, further seawards into the Atlantic than the Brittany peninsula and the island of Ushant, is a geographical fact, a fact of nature; ... Nevertheless, when account is taken of the fact that in other respects the two States abut on the same continental shelf with coasts not markedly different in extent and broadly similar in their relation to that shelf, a question arises as to whether giving full effect to the Scilly Isles in delimiting an equitable boundary out to the 1,000 metre isobath may not distort the boundary and have disproportionate effects as between the two States. In the view of the Court, the further projection westwards of the Scilly Isles, when superadded to the greater projection of the Cornish mainland westwards beyond Finistère, is of much the same nature for the present purposes, and has much the same tendency to distortion of the

equidistance line, as the projection of an exceptionally long promontory, which is generally recognized to be one of the potential forms of 'special circumstances'. In the present instance, the Court considers that the additional projection of the Scilly Isles into the Atlantic region does constitute an element of distortion which is material enough to justify the delimitation of a boundary other than the strict median line envisaged in Article 6, paragraph 1, of the Convention [on the Continental Shelf of 1958]".¹⁰⁹⁾

The crucial problem is identified in more specific terms:

"The problem therefore is, without disregarding Ushant and the Scillies, to find a method of remedying in an appropriate measure the distorting effect on the course of the boundary of the more westerly position of the Scillies and the disproportion which it produces in the areas of continental shelf accruing to the French Republic and the United Kingdom."¹¹⁰⁾

Thus what the Court considers to be an equitable solution is devised, drawing on a previous case in State practice.¹¹¹⁾

"The appropriate method, in the opinion of the Court, is to take account of the Scilly isles as part of the coastline of the United Kingdom but to give them less than their full effect in applying the equidistance method. Just as it is not the function of equity in the delimitation of the continental shelf completely to refashion geography, so it is also not the function of equity to create a situation of complete equity where nature and geography have established an inequity. Equity does not, therefore, call for coasts, the relation of which to the continental shelf is not equal, to be treated as having completely equal effects. What equity calls

for is an appropriate abatement of the disproportionate effects of a considerable projection onto the Atlantic continental shelf of a somewhat attenuated portion of the coast of the United Kingdom."¹¹²⁾

The "half-effect" method thus conceived is explained in these words:

"The method of giving half-effect consists in delimiting the line equidistant between the two coasts, first without the use of the offshore island as a base-point and secondly, with its use as a base-point; a boundary giving half-effect to the island is then the line drawn mid-way between those two equidistance lines."¹¹³⁾

The Court does not attribute any special force as a criterion to the ratio of approximately 2 to 1 in the distances of the Scillies and Ouessant from their respective mainlands, but finds in it "an indication of the suitability of the half-effect method as a means of arriving at an equitable delimitation in the present case".¹¹⁴⁾ In other words, the boundary line thus delimited is a qualified equidistance line, or a solution "as an equitable variant of the equidistance principle expressing a necessarily approximate appreciation of diverse considerations" as the Court confirms in its interpretive decision of 14 March 1978.¹¹⁵⁾

The Tunisia-Libya Continental Shelf case of 1982 is still another case in which the "geographical conditions of the arbitration area" were not only mentioned as necessary for consideration in general preliminary terms, but taken into account as specific requirements for the actual delimitation of the boundary. The Special Agreement requests the International Court of Justice, in rendering its judgment, "de tenir compte des principes équitables et des circonstances pertinentes propres à la région, ainsi que des tendances récentes admises à la troisième

Conférence sur le droit de la mer" (in the French translation of the original Arabic text supplied by Tunisia)¹¹⁶⁾ or to "take its decision according to equitable principles, and the relevant circumstances which characterize the area, as well as the new accepted trends in the Third Conference on the Law of the Sea" (in the English translation of the same supplied by Libya).¹¹⁷⁾ Thus the Court is under the obligation to "take account of" or "take its decision according to" equitable principles and the relevant circumstances of the area. The Court first refers to the necessity to take account of the relevant circumstances:

"There can be no doubt it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances of the area. ... The Special Agreement moreover confers on the Court the task of ascertaining what are the relevant circumstances and assessing their relative weight for the purpose of achieving an equitable result."¹¹⁸⁾

Following this general observation, the Court sets out to specify the relevant circumstances: i) change in direction of the coast in the Gulf of Gabès,¹¹⁹⁾ ii) Island of Jerba, Kerkennah Islands and surrounding low-tide elevations,¹²⁰⁾ iii) de facto line of 26° east of north which is roughly perpendicular to the coastline at the end of the land frontier,¹²¹⁾ iv) proportionality between the length of the coastline and the continental shelf area.¹²²⁾ Of these the circumstances of a geographical nature are i), ii) and iv). As factors ii) to iv) are to be discussed elsewhere under their appropriate headings, let it suffice to see what factor i) is. The Court identifies the legal significance of the marked change in direction of the Tunisian coast:

"While the initial part of the Tunisian coast, westwards from Ras Ajdir, runs for some distance in

approximately the same direction as the Libyan coast, the most marked characteristic of the coast ... is that it subsequently changes direction, so as to run roughly southwest-northeast. This aspect of the geographical situation as it exists in the area relevant to the decision is legally significant, in the context of the present examination of the application of equitable principles, as one of the relevant circumstances which characterize the area."¹²³⁾

Such a change of direction on the Tunisian coastline is considered to occur at the most westerly point of the coastline of the Gulf of Gabès. This chosen point is later to play an important role as the "reference-point for reflecting that change in the delimitation".¹²⁴⁾

An extremely interesting, if controversial, consideration of the geographical context of the arbitration area was given in the judgment of the International Court of Justice in the Libya-Malta Continental Shelf case of 3 June 1985. The Court defines the area to be delimited as one where there is no claim or interests of third States, and particularly Italy, involved, thus limiting its "arbitration area" to a trapezium of the 15°10'E and 13°50'E meridians and the two other sides of the Maltese and Libyan coasts.¹²⁵⁾ Having defined the area to be delimited in this way, the Court goes on to deal with the status of Malta as an island State in the Central Mediterranean.

The question here is what status should be accorded to Malta, an independent State, for purposes of shelf delimitation in a semi-enclosed sea. Libya insists that no distinction should be made between an island State and an island politically linked with a mainland State, whereas Malta distinguishes between the two.¹²⁶⁾ In the view of the Court,

"This aspect of the matter is related not solely to the circumstances of Malta being a group of islands,

and an independent State, but also to the position of its islands in the wider geographical context, particularly their position in a semi-enclosed sea."¹²⁷⁾

Repeating the necessity of looking beyond the area concerned in the present case and considering the general geographical context in which the delimitation will have to be effected, the Court observes that

"that delimitation, although it relates only to the continental shelf appertaining to two States, is also a delimitation between a portion of the southern littoral and a portion of the northern littoral of the Central Mediterranean."¹²⁸⁾

It is in this broader geographical perspective that the Court devises a unique method of modifying the initial median line between Malta and Libya—transposing it northwards so that Libya may be allowed a larger continental shelf area. Immediately following the above-quoted passage, the Court has this to say:

"If account is taken of that setting, the Maltese islands appear as a minor feature of the northern seaboard of the region in question, located substantially to the south of the general direction of that seaboard, and themselves comprising a very limited coastal segment. From the viewpoint of the general geography of the region, this southward location of the coasts of the Maltese islands constitutes a geographical feature which should be taken into account as a pertinent circumstance; its influence on the delimitation line must be weighed in order to arrive at an equitable result."¹²⁹⁾

The transposition of the median line is effected in this way:

"Let it be supposed, for the sake of argument, that the Maltese islands were part of Italian territory, and that there was a question of the delimitation of the continental shelf between Libya and Italy, within the area to which this judgment relates. Again, between opposite coasts, with a large, clear area between them, that boundary would not then be the median line, based solely upon the coasts of Libya to the south and Sicily to the north. At least some account would be taken of the islands of Malta; and even if the minimum account were taken, the continental shelf boundary between Italy and Libya would be somewhat south of the median line between the Sicilian and Libyan coasts. Since Malta is not part of Italy, but is an independent State, it cannot be the case that, as regards continental shelf rights, it will be in a worse position because of its independence. Therefore, it is reasonable to assume that an equitable boundary between Libya and Malta must be to the south of a notional median line between Libya and Sicily; for that is the line, as we have seen, which allows no effect at all to the islands of Malta. The position of such a median line, employing the base-lines on the coasts of Sicily established by the Italian Government, may be defined for present purposes by its intersection with the meridian 15°10'E; according to the information supplied to the Court, this intersection is at about latitude 34°36'N. The course of that line evidently does not run parallel to that of the median line between Malta and Libya, but its form is, it is understood, not greatly different. The equidistance line drawn between Malta and Libya (excluding as base-point the islet of Filfla), according to the information available to the Court, intersects that same meridian 15°10'E at approximately 34°12'N. A transposition northwards through 24 minutes of latitude of the Malta-Libya median line would therefore be the extreme limit of such northward adjustment."¹³⁰⁾

Admittedly this consideration of the "general geography" context is not the only factor motivating the transposition of the initial median line, which is effected in conjunction with other factors, notably the disparity in lengths of the relevant Maltese and Libyan coasts and the considerable distance between them.¹³¹⁾ Yet the broad contextual consideration as such would seem to be susceptible of criticism. It is perfectly true, as Judge Schwebel says in his dissenting opinion, that the islands of Malta, in their general geographical context, appear as a relatively small feature in a semi-enclosed sea.¹³²⁾ However that may be, they are as a whole an independent State, and the principle of sovereign equality of States should apply to the relationship between Libya and Malta. As Judge Schwebel aptly states, "the general geographical context operates neither for nor against either Malta or Libya; rather, what operates for each of them is the extent, configuration and situation of its coastal fronts—relative, however, to those of opposite and adjacent States."¹³³⁾ It is therefore in conjunction with the other relevant circumstances that the Court's transposition of the median line may be justified.

If, unlike the Court's choice of a portion of the Libyan coasts which makes the ratio of lengths of the Maltese and Libyan coasts 1 to 8, the entire stretch of the Libyan coast were included in a calculation of proportionality, the disproportion between Libya's and Malta's coasts would be so extreme that, if proportionality were to be taken as a method of delimitation—which the Court disclaims—, Malta might have very little or no continental shelf at all.¹³⁴⁾ It may be doubted whether this would be an equitable result. It is true that the Court gives no good reason for the choice of a transposition of the median line through 18 minutes of latitude, but the delimitation of a boundary line which accords to the Parties continental shelf areas at the ratio of some 3.8 to Libya and 1 to Malta¹³⁵⁾ could perhaps, if reluctantly, be said more equitable than one which would give very little or no share to Malta.

b) Consideration of actual circumstances

In the Grisbadarna arbitration of 1909 the tribunal was asked to determine the seaward portion of the territorial sea boundary between Norway and Sweden. The basis of decision, as well as the issue, was laid down in Article 3 of the compromis of 14 March 1908: "le tribunal aura à fixer ... en tenant compte des circonstances de fait et des principes du droit international."¹³⁶⁾ In this connexion there was a further understanding that "les lignes limitant la zone, qui peut être l'objet du litige par suite des conclusions des parties, et dans laquelle la ligne frontière sera par conséquent établie, ne doivent pas être tracée de façon à comprendre ni des îles, ni des îlots, ni des récifs qui ne sont pas constamment sous l'eau".¹³⁷⁾ The tribunal was thus authorized to take into account "des circonstances de fait" and "des îles", "des îlots" and "des récifs qui ne sont pas constamment sous l'eau", along with the application of the principles of international law.

The tribunal shows three main considerations of equity which, combined together, contribute to the eventual delimitation of a single maritime boundary line. First, it notes that the parties are agreed on the great inconveniences which would result from a boundary line dividing the important fishing banks.¹³⁸⁾ Such a line, however, would have been drawn on the basis of the automatic division of maritime territory as a result of the Roskilde peace treaty of 1658, for the line should have been drawn perpendicularly to the general direction of the coast, extending towards the west at about 20° to the south. If it were drawn at an angle of 19° instead of 20°, the line would completely avoid the mentioned inconveniences and run between the two important banks of the Grisbadarna and the Skjöttegrunde.¹³⁹⁾

Secondly, the tribunal finds that Sweden has a far better record of utilization and management of the Grisbadarna than Norway:

"... une démarcation qui attribue les Grisbadarna à la Suède se trouve appuyée par l'ensemble de plusieurs circonstances de fait, qui ont été relevées aux cours des débats, et dont les principales sont les suivantes:

a) la circonstance que la pêche aux homards aux bas-fonds de Grisbadarna a été exercée depuis un temps bien plus reculé, dans une bien plus large mesure et avec un bien plus grand nombre de pêcheurs par les ressortissants de la Suède que par ceux de la Norvège;

b) la circonstance que la Suède a effectué dans les parages de Grisbadarna, surtout dans les derniers temps, des actes multiples émanés de sa conviction que ces parages étaient suédois, comme, par exemple, le balisage, le mesurage de la mer et l'installation d'un bateau-phare, lesquels actes entraînaient des frais considérables et par lesquels elle ne croyait pas seulement exercer un droit mais bien plus encore accomplir un devoir; tandis que la Norvège, de son propre aveu, sous ces divers rapports s'est souciée bien moins ou presque pas de tout de ces parages."¹⁴⁰⁾

Concerning circumstance a) above, the tribunal states that "dans le droit des gens, c'est un principe bien établi, qu'il faut s'abstenir autant que possible de modifier l'état des choses existant de fait et depuis longtemps", adding that this principle should be applied especially with respect to private interests which, once damaged, could not be safeguarded effectively.¹⁴¹⁾

Thirdly, the tribunal accepts the Norwegian interests in the Skjöttegrunde:

"... une démarcation, qui attribue les Skjöttegrunde--la partie la moins importante du territoire litigieux--à la Norvège se trouve suffisamment appuyée, de son côté, par la circonstance de fait sérieuse que, quoiqu'on doive conclure des divers documents et témoignages, que les pêcheurs Suédois--comme il a été dit plus haut--ont exercé la

pêche dans les parages en litige depuis un temps plus reculé, dans une plus large mesure et en plus grand nombre, il est certain d'autre part que les pêcheurs Norvégiens n'y ont été jamais exclus de la pêche; ... en outre il est avéré qu'aux Skjöttegrunde, les pêcheurs Norvégiens ont presque de tout temps, et d'une manière relativement bien plus efficace qu'aux Grisbadarna, pris part à la pêche aux homards."¹⁴²⁾

It is an equitable consideration that the tribunal has dealt with the Skjöttegrunde, "the less important part of the disputed territory", with so much care as would have been due to that area.

Thus the tribunal would seem to have struck the balance equitably, attributing the Grisbadarna in its entirety to Sweden and the Skjöttegrunde in its entirety to Norway and thereby drawing the boundary line between these major fishing banks.

An equitable consideration of actual circumstances, though on a minor scale, was shown in the Beagle Channel case of 1977 in the tracing of the boundary line:

"In drawing its own line ... the Court has been guided by the considerations indicated in Annex IV hereto (which shows how the line has been traced),--in particular by mixed factors of appurtenance, coastal configuration, equidistance, and also of convenience, navigability, and the desirability of enabling each Party so far as possible to navigate in its own waters. None of this has resulted in much deviation from the strict median line except, for obvious reasons, near Gable Island where the habitually used navigable track has been followed."¹⁴³⁾

Annex IV states in part:

"The Boundary-Line itself is the resultant of construction lines drawn between opposite, shore to shore, points, sometimes to or from straight

baselines. It is in principle a median line, adjusted in certain relatively unimportant respects for reasons of local configuration or of better navigability for the Parties. Over the whole course, account has been taken of sand banks, siltings, etc. which would make a strict median-line unfair, as in the case of certain islets or rocks."¹⁴⁴⁾

Judge Gros, in his Declaration, presents a broader approach of viewing the case within the whole "complex" of events and circumstances--not only with respect to the tracing of the boundary line but the whole context of the dispute. Although he has reached the same conclusion as the Court, he has done so as a result of taking account of the "whole complex comprising the text, its historical origins, the general political circumstances of the negotiations, and the explanation given by the negotiators and statesmen".¹⁴⁵⁾

The Anglo-French Continental Shelf case of 1977 has, in its aspect of the Channel Islands region, a similar treatment of the actual circumstances. The basis of decision as provided in Article 2, paragraph 2, of the compromis--"the rules of international law applicable in the matter as between the Parties"--is interpreted by the Court as not foreclosing the appreciation of the conditions of the Channel Islands.

"The political status of the Channel Islands vis-à-vis France for the purpose of the delimitation of the continental shelf is, therefore, a matter to be appraised by this Court itself."¹⁴⁶⁾

Thus the Court does not "deny all relevance to the size and importance of the Channel Islands which ... may properly be taken into account in balancing the equities in this region".¹⁴⁷⁾

Another point of interest is the Court's consideration for the potential extension to 12 miles of the territorial sea of the Islands. After reciting the French and British

establishment of 12-mile fishery zones, the French extension of her territorial sea to 12 miles and a potential British extension of her territorial sea to 12 miles, the Court states:

"Consequently, the Court has to take account of the fact that, apart from their three-mile zone of territorial sea the Channel Islands have an existing fishery zone of 12 miles, expressly recognized by the French Republic, and the potentiality of an extension of their territorial sea from three to 12 miles."¹⁴⁸⁾

As a result of this the Court is later to award a belt of 12-mile continental shelf to the Islands, an enclave of British continental shelf area lying within the French continental shelf area, instead of sticking to the strictly positivist position.¹⁴⁹⁾

c) Legal ties based on tribal and religious backgrounds.

In the Western Sahara case of 1975, the International Court of Justice was requested by the General Assembly of the United Nations to give an advisory opinion on these questions:

"I. Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?

If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?"¹⁵⁰⁾

Whilst finding that there existed "legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara" and that there existed "rights, including some rights relating to the land, which

constituted legal ties between the Mauritanian entity ... and the territory of Western Sahara", the Court did not see "any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity" established.¹⁵¹⁾ In this finding may be seen no particular trait of equitable consideration.¹⁵²⁾

But in recognizing the existence of "legal ties" between Western Sahara and her neighbours, the Court may well be understood to have presented a new interpretation of the word "legal", somewhat different from its traditional, Western-oriented meaning.¹⁵³⁾ As background for such interpretation, the Court first introduces the peculiar characteristics of the area concerned.

"At the time of its colonization by Spain, the area of this desert ... was being exploited, because of its low and spasmodic rainfall, almost exclusively by nomads, pasturing their animals or growing crops as and where conditions were favourable. It may be said that the territory, at the time of its colonization, had a sparse population that, for the most part, consisted of nomadic tribes the members of which traversed the desert on more or less regular routes dictated by the seasons and the wells or water-holes available to them.¹⁵⁴⁾

"In consequence, the nomadic routes of none of them were confined to Western Sahara; some passed also through areas of southern Morocco, or of present-day Mauritania or Algeria, and some even through further countries. All the tribes were of the Islamic faith and the whole territory lay within the Dar al-Islam.¹⁵⁵⁾ In general, authority in the tribe was vested in a sheikh, subject to the assent of the 'Juma'a', that is, of an assembly of its leading members, and the tribe had its own customary law applicable in conjunction with the Koranic law. Not infrequently one tribe had ties with another, either of dependence or of alliance, which were essentially tribal rather than territorial, ties of allegiance or

vassalage."¹⁵⁶⁾

It is against such background that the Court holds:

"It is in the context of such a territory and such a social and political organization of the population that the Court has to examine the question of the 'legal ties' between Western Sahara and the Kingdom of Morocco and the Mauritanian entity at the time of colonization by Spain."¹⁵⁷⁾

While being within the bounds of a legal consideration in the light of the implications of Article 9 of the Statute of the Court,¹⁵⁸⁾ such a consideration is undoubtedly an equitable one in that it is intended for a realization of justice under the particular circumstances of the case.

d) Geographical realities, decisive

The very peculiar geographical conditions of the coastal State, together with the local population's livelihood dependent on such geographical realities, were considered decisive in determining the baseline from which the breadth of the territorial sea is measured in the Fisheries case of 1951. The crucial point was the "skjaergaard", a chain of outlying islands at a short distance from the mainland of Norway, which Norway claimed should constitute base-points for drawing a series of straight baselines. The Court states:

"Within the 'skjaergaard', almost every island has its large and its small bays; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local population which inhabits the islands as it does the mainland. The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer

line of 'skjaergaard'.

"The whole of this region is mountainous. The North Cape, a sheer rock little more than 300 meters high, can be seen from a considerable distance; there are other summits rising to over a thousand metres, so that the Norwegian coast, mainland and 'skjaergaard', is visible from far off.

"Along the coast are situated comparatively shallow banks, veritable under-water terraces which constitute fishing grounds where fish are particularly abundant; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of the method of alignments ('meds'), at points where two lines drawn between points selected on the coast or on islands intersect.¹⁵⁹⁾

"In these barren regions the inhabitants of the coastal zone derive their livelihood from fishing.

"Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law."¹⁶⁰⁾

The Court then concludes on the impact of such geographical realities on the delimitation of the territorial sea:

"The Court finds itself obliged to decide whether the relevant low-water mark is that of the mainland or of the 'skjaergaard'. Since the mainland is bordered in its western sector by the 'skjaergaard', which constitutes a whole with the mainland, it is the outer line of the 'skjaergaard' which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities."¹⁶¹⁾ (Emphasis added)

e) Presence of islands as a special circumstance

In the Anglo-French Continental Shelf case, the Channel Islands region was one of the two main areas which, in the view of the Court of Arbitration, presented difficulties in discharging its task. The French argued that because of their proximity to the French coast, they would create inequity if given full effect as British territory, and that they constituted a "special circumstance" in the meaning of Article 6 of the Convention on the Continental Shelf of 1958.¹⁶²⁾ The United Kingdom contended that the Channel Islands, because of their large size and legal and economic importance, could not constitute a "special circumstance" which only very small islands could constitute, as the travaux préparatoires of the Convention show.¹⁶³⁾ To the Court the controversial Islands appeared to be prima facie "a special circumstance" within the meaning of Article 6. It also thought them to constitute "a circumstance creative of inequity" merely prima facie.¹⁶⁴⁾ In the opinion of the Court, the solution must be equitable "in relation to both Parties and in the light of all the relevant circumstances".¹⁶⁵⁾

It is in search of such a solution that the Court attempted an "intermediate solution" which would effect a "more appropriate and a more equitable balance between the respective claims and interests of the Parties".¹⁶⁶⁾ This is how the twofold "intermediate solution" was conceived:

"First, in order to maintain the appropriate balance between the two States in relation to the continental shelf as riparian States of the Channel with approximately equal coastlines, the Court decides that the primary boundary between them shall be a median line, ... In delimiting its course in the Channel Islands region, ... the Channel Islands themselves are to be disregarded, since their continental shelf must be the subject of a second and separate delimitation.

"The second part of the solution is to delimit a

second boundary establishing, vis-à-vis the Channel Islands, the southern limit of the continental shelf held by the Court to be appurtenant to the French Republic in this region to the south of the mid-Channel median line. This second boundary must not, in the opinion of the Court, be so drawn as to allow the continental shelf of the French Republic to encroach upon the established 12-mile fishery zone of the Channel Islands. The Court therefore further decides that this boundary shall be drawn at a distance of 12 nautical miles from the established baselines of the territorial sea of the Channel Islands. The effect will be to accord to the French Republic a substantial band of continental shelf in mid-Channel which is continuous with its continental shelf to the east and west of the Channel Islands region; and at the same time to leave to the Channel islands, to their north and to their west, a zone of sea-bed and subsoil extending 12 nautical miles from the baselines of the two Bailiwicks."¹⁶⁷⁾

In the Tunisia-Libya Continental Shelf case, the Island of Jerba and the Kerkennah Islands were circumstances which called for consideration.¹⁶⁸⁾ Since the presence of the Island of Jerba was in the end given no special effect in favour of the other prevailing considerations,¹⁶⁹⁾ it suffices here to treat the existence and position of the Kerkannah Islands. This factor was considered by the Court in the broad context of calculating the bearing of a line as reflecting the general direction of the Tunisian coastline from its most westerly point north-eastward. The Court first evaluates the position of the Islands.

"The general change in direction of the Tunisian coast may, in the view of the Court, be regarded as expressed in a line drawn from the most westerly point of the Gulf of Gabès ... to Ras Kaboudia, and the Court notes that the bearing of this line is

approximately 42° to the meridian. To the east of this line, however, lie the Kerkennah Islands surrounded by islets and low-tide elevations, and constituting by their size and position a circumstance relevant for the delimitation, and to which the Court must therefore attribute some effect. ... In these geographical circumstances, the Court has to take into account not only the islands, but also the low-tide elevations which, while they do not, as do islands, have any continental shelf of their own, do enjoy some recognition in international law for certain purposes, as is shown by the 1958 Geneva Conventions as well as the draft convention on the Law of the Sea. ... a line drawn from [the most westerly point of the Gulf of Gabès] along the seaward coast of the actual islands would clearly run at a bearing of approximately 62° to the meridian. However, the Court considers that to cause the delimitation line to veer even as far as 62°, to run parallel to the coastline, would, in the circumstances of the case, amount to giving excessive weight to the Kerkennahs."¹⁷⁰⁾

Without further specifying the reason or reasons why a delimitation line running parallel to the Kerkennah coastline would amount to giving excessive weight to the Islands,¹⁷¹⁾ the Court goes on to propose a "half-effect" or "half-angle" method, perhaps drawing on a similar method used in the Anglo-French Continental Shelf case:

"Taking into account the position of the Kerkennah Islands, and the low-tide elevations around them, the Court considers that it should go so far as to attribute to the Islands a 'half-effect'. ... On this basis the delimitation line, seawards of the parallel of the most westerly point of the Gulf of Gabès, is to be parallel to a line drawn from that point bisecting the angle between the line of the Tunisian coast (42°) and the line along the seaward coast of the Kerkennah Islands (62°), that is to say at an angle of 52° to

the meridian."¹⁷²⁾

Still another equitable consideration can be found in an arbitral tribunal allowing a 12-mile belt of territorial sea around an island as envisaged in the United Nations Convention on the Law of the Sea of 1982. In the arbitration between Guinea and Guinea Bissau on the maritime boundary delimitation of 14 February 1985, the tribunal was requested to draw the boundary line.¹⁷³⁾ In interpreting the boundary treaty of 1886 between France and Portugal, former colonial powers of the parties, the tribunal considered the phrase of "limite sud" in Article 1, paragraph 5, as a factor to be taken into account for an equitable delimitation of that portion of the boundary line which should run from the coast to the north of the Alcatraz Island. It was a line 2.25 miles north of the island. In the words of the tribunal,

"Ensuite ladite limite emprunte le parallèle de 10°40' de latitude nord et passe à 2,25 milles marins au nord de l'île d'Alcatraz, qui est la possession la plus occidentale de la Guinée. ... Pour tous ces motifs, le Tribunal s'estime fondé à considérer la 'limite sud' jusqu'à la hauteur d'Alcatraz comme un facteur dont il doit tenir compte en vue d'une délimitation tendant à obtenir un résultat équitable."¹⁷⁴⁾

In what it deems to be an equitable solution, however, the tribunal awards a belt of 12 miles to the west of the island:

"Puisque ... l'île en question n'aurait que 2,25 milles marins d'eaux territoriales vers le nord et qu'il existe d'autant moins de motif de lui en accorder plus dans cette direction que la 'limite sud' marque la revendication maximale de la Guinée dans ses conclusions, le Tribunal considérerait comme équitable de lui attribuer au moins vers l'ouest les 12 milles

marins prévus par la convention sur le droit de la mer de 1982, sans toutefois tenir compte des récifs. La 'limite sud' pourrait donc être adoptée jusqu'à 12 milles à l'ouest d'Alcatraz; ..."¹⁷⁵⁾

2) Consideration of economic factors

a) Consideration of local economic interests

In the Behring Sea Fur Seal arbitration of 1893, the tribunal gave an equitable exceptional consideration for the interests of the local Indian population living on their traditional fur seal fishing. Under the compromis of 29 February 1892, the tribunal was to proceed "impartially and carefully examine and decide the questions"¹⁷⁶⁾ concerning "the jurisdictional rights of the United States in the waters of Behring Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters."¹⁷⁷⁾ It decided, as matters of law, on the five specified points which it was asked by the compromis to answer. On Point 5, the crux of the controversy, it held that "the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary 3-mile limit".¹⁷⁸⁾

This decision, however, seems to have been balanced, as it were, by a set of "concurrent Regulations" setting forth the rules to be observed by fur-seal fishers of either party, which are of a restrictive nature.¹⁷⁹⁾ Article 8 thereof provides:

"The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur-seal fishing in canoes or undecked boats not transported by or used in

connection with other vessels and propelled wholly by paddles, oars, or sails, and manned by not more than five persons each in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons, and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for the delivery of the skins to any person. ..."¹⁸⁰⁾

Thus the aborigines were given certain preferential treatment, provided they fished on their own in their traditional manner.

The local economic interests were taken into account, in addition to the peculiar geographical realities, in the determination of the baselines from which the breadth of the territorial sea is measured in the Anglo-Norwegian Fisheries case. In the description of the peculiar geographical features and configurations of the Norwegian coasts, the International Court of Justice briefly refers to the basic economic conditions of the local people:

"In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing."¹⁸¹⁾

This is confirmed later with more emphasis:

"Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."¹⁸²⁾

In the Fisheries Jurisdiction case (Merits) of 1974, the International Court of Justice recognized the preferential fishing rights of the coastal State in a situation of special dependence on coastal fisheries.

Originating in the proposals submitted by Iceland at the Geneva Conference of 1958, the concept of preferential rights for coastal State, while having failed to obtain the necessary majority at the Conference, was in effect incorporated in a resolution concerning the situation of countries or territories whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development.¹⁸³⁾ Then at the 1960 Conference it was embodied in a joint amendment presented by Brazil, Cuba and Uruguay, which in turn was incorporated by a substantial vote into a joint United States-Canada proposal concerning a 6-mile territorial sea and an additional 6-mile fishery zone subject to a phasing-out period.¹⁸⁴⁾ Some State practice also endorses the trend. The Court is explicit in recognizing the concept of such preferential rights as customary law:

"Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference [of 1960]. ... The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries"¹⁸⁵⁾

Indeed Iceland's exceptional dependence on its fisheries had been explicitly recognized by the United Kingdom, the Applicant, in the Exchange of Notes of 11 March 1961,¹⁸⁶⁾ and the Court took judicial note of it by declaring that it was "necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development".¹⁸⁷⁾

b) Presence of mineral resources astride the boundary

In the North Sea Continental Shelf cases the unity of mineral deposits was considered as a factual element to be taken into account in the delimitation of continental shelf boundaries. Indeed as the Truman Proclamation of 1945

shows, the very idea of a legal regime for the continental shelf started with the desire to exploit the mineral resources. But, as the Court says,

"it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned."¹⁸⁸⁾

While taking note of some State practice in the North Sea region in the matter of the unity of deposits, however, the Court does not consider it anything more than "a factual element which it is reasonable to take into consideration in the course of negotiations for a delimitation".¹⁸⁹⁾ As one of the alternative solutions, the Court shows the régime of joint development, an equitable and practical form of solution, in one of the two "principles and rules of international law applicable to the delimitation as between the Parties of the ... continental shelf in the North Sea" which should guide the negotiations of the Parties:

"if ... the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them."¹⁹⁰⁾

Judge Jessup, in his separate opinion, presents a number of economic factors which he believes to merit consideration in a delimitation, on the basis of an extensive study of the practice of States, especially the Parties to the case.¹⁹¹⁾

In the Tunisia-Libya Continental Shelf case, Judge ad hoc Evensen propounds a system of joint development area

formed by two lines at an angle of 10° - 15° on both sides of his proposed delimitation line. Based on the idea that an arrangement for joint development over restricted overlapping areas may be "a corollary to other equity considerations",¹⁹²⁾ he presents, first, an adjusted equidistance line starting from the point where the "de facto line from Ras Ajdir at an angle of 26° east of north"¹⁹³⁾ intersects the 12-mile territorial sea limit. He proposes such an adjusted line to veer from this point in a direction some 46° - 47° (north-east). Then he sets out a joint exploitation zone:

"On both sides of the straightened line a line veering some 10° - 15° from the delimitation line should be drawn. The areas thus indicated should be of approximately the same size. The two areas thus indicated should constitute a joint exploitation zone."¹⁹⁴⁾

c) Avoidance of probable inconveniences by tilting the boundary line

In the Grisbadarna case, the expected inconveniences which the application of a treaty would have caused to the parties were avoided by tilting the delimitation line by a degree. The Roskilde peace treaty of 1658 provided for an automatic division of maritime territory, but the dividing line would have been drawn, on a rational basis, perpendicularly to the general direction of the coast. Thus the line should extend westwards at an angle of about 20° south of west.¹⁹⁵⁾ But it would have cut across the Grisbadarna bank, causing a great inconvenience as the parties admitted. The tribunal tilted the line by a degree to avoid it.

"... les Parties sont d'accord à reconnaître le grand inconvénient qu'il y aurait à tracer la ligne frontière à travers des bancs importants;

"... une ligne de frontière, tracée du point XX dans

la direction de l'Ouest, à 19 degrés au Sud, éviterait complètement cet inconvénient puis qu'elle passerait juste au Nord des Grisbadarna et au Sud des Skjöttegrunde et qu'elle ne couperait non plus aucun autre banc important."¹⁹⁶⁾

This was not an independent motivation of the solution, but, together with a consideration of actual circumstances, provided an equitable solution.¹⁹⁷⁾

d) Consideration of the existence of a de facto boundary

In the Tunisia-Libya Continental Shelf case, the Court indicated several relevant circumstances to be taken into account in achieving an equitable delimitation, one of which was a de facto maritime boundary line as evidenced in the conduct of the parties prior to 1974 in the grant of petroleum concessions. Such a line is supported by some evidence, according to the Court: the initial grants of concessions for offshore exploration and exploitation of oil and gas; its correspondence to the line perpendicular to the coast at the end of the land frontier; virtual observance of it in subsequent concessions; and its correspondence to the fisheries jurisdiction line of a modus vivendi during the colonial days.

The Court reasons as follows:

"... the Court could not fail to note the existence of a de facto line from Ras Adjir at an angle of some 26° east of north, which was the result of the manner in which both Parties initially granted concessions for offshore exploration and exploitation of oil and gas. This line of adjoining concessions, which was tacitly respected for a number of years, and which approximately corresponds furthermore to the line perpendicular to the coast at the frontier point which had in the past been observed as a de facto maritime limit, does appear to the Court to constitute

a circumstance of great relevance for the delimitation."198)

Such a line is supported by the subsequent conduct of the parties, which the Court describes in these words:

"The circumstance ... which the Court finds to be highly relevant to the determination of the method of delimitation is a circumstance related to the conduct of the Parties. ... the history of the enactment of petroleum licensing legislation by each Party, and the grant of successive petroleum concessions, during the period from 1955 up to the signing of the Special Agreement, shows that ... the phenomenon of actual overlapping of claims did not appear until 1974, and then only in respect of areas some 50 miles from the coast. A Tunisian enlarged concession of 21 October 1966 was bounded on the east by a 'stepped' line (a form apparently dictated by the grid/block system for grant concession) the eastern angles of which lay on a straight line at a bearing of approximately 26° to the meridian. In 1968 Libya granted a concession (No.137) 'lying to the eastward of a line running south/southwest from the point 33°55'N, 12°E to a point about one nautical mile offshore' the angle thereof viewed from Ras Ajdir being 26°; the western boundaries of subsequent Libyan concessions followed the same line, which Libya has explained, 'followed the direction of the Tunisian concessions'. The result was ... a de facto line dividing concession areas which were the subject of active claims, in the sense that exploration activities were authorized by one Party, without interference, or (until 1976) protests, by the other. The Court does not of course overlook the fact that the areas to which a legal claim was asserted by both Parties were more far-reaching; Libya claimed sovereign rights as far west as the ZV 45° line, and in 1974 adopted an equidistance line as south-eastern boundary of its

concessions. The actual situation, however, was that which has just been described.¹⁹⁹⁾

"[The de facto line] was drawn by each of the two States separately, Tunisia being the first to do so, for purposes of delimiting the eastward and westward boundaries of petroleum concession, a fact which, in view of the issues at the heart of the dispute between Tunisia and Libya, has great relevance."²⁰⁰⁾

During the colonial days a modus vivendi was entered into concerning the delimitation of a fisheries jurisdiction line at approximately 26° to the meridian.

"A further relevant circumstance is that the 26° line thus adopted was neither arbitrary nor without precedent in the relations between the two States. ... The Court has already indicated how, in the relations between France and Italy during the period when these States were responsible for the external relations of present-day Tunisia and Libya, there came into existence a modus vivendi concerning the lateral delimitation of fisheries jurisdiction expressed in de facto respect for a line drawn from the land frontier at approximately 26° to the meridian ... which was proposed on the basis that it was perpendicular to the coast."²⁰¹⁾

3) Balancing-up of relevant circumstances

Experience shows that the consideration of individual relevant circumstances as independent, separate factors unrelated to each other is not enough for an equitable settlement of the dispute, but that a weighing of the equities of the parties or all those circumstances is necessary for such a settlement. Apart from how it was applied in the arbitration, which is analyzed elsewhere under another heading, the compromis of 2 February 1897 for the British Guiana-Venezuela boundary arbitration, Article 4, provides an example:

"(c) In determining the boundary-line, if territory of one Party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require."²⁰²) (Emphasis added)

In the North Sea Continental Shelf cases, a general comment to such effect is made in considering the relevant circumstances to be taken into account for an equitable boundary delimitation:

"... there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case."²⁰³)

In the Anglo-French Continental Shelf case of 1977, the Court of Arbitration, after deciding that the legal rules to be applied in the Channel Islands region are those of customary international law, rather than of Article 6 of the Convention on the Continental Shelf, discusses the principle of natural prolongation which is thought applicable under customary international law. Unlike some misunderstanding by writers of the status which the International Court of Justice has placed on the principle of natural prolongation in the North Sea Continental Shelf cases,²⁰⁴) the Court of Arbitration gives a relative weight to it by balancing it with other relevant circumstances. If the force of the principle of natural prolongation of land territory were absolute, an island, large or small, would block the natural prolongation of the territory of

the nearby mainland, as in the Channel Islands region. As the Court says, "The question of the appurtenance to the Channel Islands of the areas of continental shelf extending to their north and north-west is not therefore resolved merely by referring to the principle of natural prolongation of territory."²⁰⁵⁾ In more general terms, the Court goes on to say, the application of the principle has to be appreciated in the light of all the relevant geographical and other considerations of law and equity.²⁰⁶⁾ Thus the Court proceeds to devise the "intermediate solution" of awarding an enclave of continental shelf area around the Channel Islands to their north and north-west, which all lies within the French area of the continental shelf.²⁰⁷⁾

In the Tunisia-Libya Continental Shelf case of 1982, Judge ad hoc Jiménez de Aréchaga, discussing in his separate opinion the equidistance method and equitable principles under the head of "New Accepted Trends at the Third UNCLOS", one of the three factors which the Court was requested by the compromis to take account of in rendering its decision,²⁰⁸⁾ makes reference to the balancing of relevant circumstances:

"... the application of equidistance and of equitable principles are not to be viewed as two distinct and successive phases, nor as requiring that equitable principles are only to be resorted to after applying equidistance, in order to correct its result. There is no such succession in time and the process must be a simultaneous one. All the relevant circumstances are to be considered and balanced; they are to be thrown together into the crucible and their interaction will yield the correct equitable solution of each individual case."²⁰⁹⁾

While the metaphor of the crucible may be unconvincing, it should be to his credit that he pointed out that "All the relevant circumstances are to be considered and balanced".

- 4) Equitable balancing of interests of the parties
- a) Practical regulation of a positive right in reciprocation to its recognition in principle

In the Behring Sea Fur Seal Fishery case of 1893, of the five questions submitted to the arbitral tribunal for decision, point 5, the crucial one, was worded as follows:

"Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?"²¹⁰⁾

The tribunal held, by a majority of 5:

"... the United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit."²¹¹⁾

Thus the right of the British nationals, as of any other countries, to take fur seals on the high seas or outside the territorial sea of the United States was recognized. But the set of "concurrent Regulations" which was drafted by the three neutral arbitrators and acceded to by one of the British arbitrators provided for some restrictive measures. Article 1 bans totally any killing, capture or pursuit of fur seals within a zone of 60 miles around the Pribilof Islands; Article 2 provides for a close season of 1 May to 31 July both inclusive in the specified parts of the north Pacific Ocean; Articles 3 to 7 stipulate modes and procedures of fishing operations; Article 8 excepts the aboriginal Indians from the restrictive measures; and Article 9 lays down the duration of the Regulations.²¹²⁾

In the words of the United States Agent, the Regulations were drafted "for the protection and preservation of the seal herd" consistent with the tribunal's decision on point

5.²¹³⁾ In this sense it would seem that an equitable balance was struck between the decision on point 5 and the Regulations.

b) Reciprocity of the performances of the parties

In the Diversion of Water from the Meuse case of 1937, Judge Hudson appended an individual opinion in which he developed an extensive discussion of equity. On the basis of a general discussion of equity in international law, he places the Netherlands and Belgium on even ground so far as their respective "Locks" in question were concerned under the treaty of 1863, in reply to the Netherlands contention that the feeding of certain canals by the Neerhaeren Lock with water taken from the Meuse elsewhere than at Maestricht is contrary to the Treaty of 1863 and that Belgium should discontinue that feeding.

As a result of a brief comparative description of Bosscheveld Lock in the Netherlands territory and the Neerhaeren Lock in Belgian territory,²¹⁴⁾ he places the two Locks on an equal footing in respect of their physical aspects:

"The Bosscheveld Lock and the Neerhaeren Lock are thus alike, in that the operation of each of them results in supplying to the Zuid-Willemsvaart a considerable quantity of lock-water taken from the Meuse but not by the conventional prise d'eau."²¹⁵⁾

An analysis of some relevant provisions of the Treaty of 1863 Regulating the Diversion of Water from the River Meuse adds to the above conclusion:

"It must be concluded that, in law as well as in fact, the Bosscheveld Lock and the Neerhaeren Lock are in the same position. The latter cannot be treated more unfavourably than the former. If the discharge of lock-water into the Zuid-Willemsvaart by one of these locks is in accordance with the Treaty, it is

equally so with respect to the other lock; if such discharge is a violation of the Treaty as to one lock, it is a violation also as to the other lock."²¹⁶⁾

Then he discusses equity as a part of international law in some detail, and concludes that "under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply".²¹⁷⁾ Based on this understanding of equity, he goes on to state:

"It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. ...

"... in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness."²¹⁸⁾
(Emphasis added)

Thus Judge Hudson argues for reciprocity between the parties:

"As the moving Party, the Netherlands asks that the Belgian action with respect to the operation of the Neerhaeren Lock be declared contrary to the Treaty of 1863, and that Belgium be ordered to discontinue that action. Yet, in its operation of the Bosscheveld Lock, the Netherlands itself is now engaged in taking precisely similar action, similar in fact and similar in law. This seems to call for an application of the principle of equity stated above.

"One result of applying the principle will be that even if the Court should be of the opinion that the Belgian action with regard to the functioning of the

Neerhaeren Lock is contrary to the Treaty of 1863, it should nevertheless refuse in this case to order Belgium to discontinue that action. In equity, the Netherlands is not in a position to have such relief decreed to her. Belgium cannot be ordered to discontinue the operation of the Neerhaeren Lock when the Netherlands is left free to continue the operation of the Bosscheveld Lock. ..."²¹⁹⁾

On one further point that the Netherlands request the Court to render a declaratory judgment for the protection against a continuance of the violation of the Treaty of 1863, rather than for the reparation for a past violation thereof, Judge Hudson, while admitting that in international jurisprudence "a declaratory judgment will frequently have the same compulsive force as a mandatory judgment", concludes emphatically:

"In the circumstances of this case, on the assumption that the operation of both the Neerhaeren Lock and the Bosscheveld Lock is contrary to the Treaty of 1863, the Netherlands would not be entitled to a declaratory judgment for the same reason that it is not entitled to a mandatory judgment."²²⁰⁾

In a word Judge Hudson would seem to be based on the fundamental perception of fairness.

5) Balanced obligation of the parties

a) Obligation of the upstream country to reconcile its interests with those of the downstream country

In the Lake Lanoux case of 1957, the arbitral tribunal was asked to consider the two "questions fondamentales":

"a) Les travaux d'utilisation des eaux du lac Lanoux, dans les conditions prévus au projet et aux propositions français visés au préambule du compromis

constitueraient-ils, en eux-mêmes, une infraction au droits reconnus à l'Espagne par les dispositions de fond du Traité de Bayonne du 26 mai 1866 et de l'Acte additionnel de la même date?

"b) En cas de réponse négative à la question précédente, l'exécution dedit travaux constituerait-elle une infraction aux dispositions du Traité de Bayonne du 26 mai 1866 et de l'Acte additionnel de la même date, pour la raison que ces dispositions subordonneraient, en tout cas, ladite exécution à un accord préalable entre les deux Gouvernements ou que d'autres règles de l'article 11 de l'Acte additionnel concernant les tractations entre les deux Gouvernements n'auraient pas été respectées?"²²¹⁾

Proceeding, as it did, on a strictly legal basis of decision, on which the compromis of 19 November 1956 was silent, the tribunal in the end answered both questions in the negative. In connexion with the second question, it first denies the alleged obligation of prior agreement for the use of water of an international waterway under customary law or as a general principle of law.²²²⁾ It admits the obligation to seek agreement through negotiations, but not agreement as such.²²³⁾ Yet the tribunal, in accordance with Article 11 of the "Acte additionnel", states that the littoral country planning a new work likely to change the flow of water has an obligation to give prior notification to the other riparian country of such a project.²²⁴⁾

Secondly, the tribunal deals with the question of how "tous les intérêts qui pourraient être engagés de part et d'autre" should be protected. It is here that the tribunal identifies an equitable obligation on the part of the upstream country to take due account of the interests of the downstream country:

"Le tribunal est d'avis que l'Etat d'amont a, d'après les règles de la bonne foi, l'obligation de prendre en considération les différents intérêts en

présence, de chercher à leur donner toutes les satisfactions compatibles avec la poursuite de ses propres intérêts et de montrer qu'il a, à ce sujet, un souci réel de concilier les intérêts de l'autre riverain avec les siens propres."²²⁵⁾

Again, more specifically, the tribunal goes on to elaborate on the point:

"Quand on examine si la France a, tant dans les tractations que dans les propositions, pris suffisamment en considération les intérêts espagnols, il faut souligner combien sont intimement liées l'obligation de tenir compte, au cours des tractations, des intérêts adverses et l'obligation de faire à ceux-ci, dans la solution retenue, une place raisonnable. Un Etat qui a conduit des négociations, avec compréhension et bonne foi, selon l'article 11 de l'Acte additionnel, n'est pas dispensé de faire, dans la solution retenue, une place raisonnable aux intérêts adverses, parce que les conversations ont été interrompues, fût-ce par l'intransigeance de son partenaire. A l'inverse, lorsqu'il s'agit d'apprécier la manière dont un projet tient compte des intérêts en présence, la façon dont les négociations se sont déroulées, l'inventaire des intérêts qui a pu y être présenté, le prix que chacune des Parties était prête à payer pour en obtenir la sauvegarde sont des facteurs essentiels pour établir, au regard des obligations de l'article 11 de l'Acte additionnel, le mérite de ce projet."²²⁶⁾

In the opinion of the tribunal, France's project met the conditions as set out by Article 11 of the "Acte additionnel" in the light of all the circumstances of the case.²²⁷⁾

b) Obligation to inform of one's stay in return for privileges granted

In the North Atlantic Coast Fisheries case of 1910 before the Permanent Court of Arbitration, the tribunal showed a discernible consideration of equity in the sense of fairness or reciprocity in connexion with Question IV, which was worded as follows:

"Under the provisions of the said Article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?"²²⁸⁾

The tribunal answers the question in the negative, but requires the privileged American fishermen to fulfil a minimal obligation in return for the privileges:

"It seems reasonable, however, in order that these privileges accorded by Great Britain on these grounds of hospitality and humanity should not be abused, that the American fishermen entering such bays for any of the four purposes aforesaid and remaining more than 48 hours therein, should be required, if thought necessary by Great Britain or the Colonial Government, to report, either in person or by telegraph, at a custom-house or to a customs official, if reasonably convenient opportunity therefor is afforded."²²⁹⁾

c) Obligation of the coastal State to give equitable shares to foreign countries traditionally fishing in the coastal waters

In the Fisheries Jurisdiction case (Merits) of 1974, the International Court of Justice, after finding that Iceland has preferential fishing rights in a situation of special dependence on coastal fisheries, admits the Applicant's special interests in the disputed waters for centuries, which the Court substantiates with Iceland's concession of it as evidenced in the Exchange of Notes of 11 March 1961, the discussions between the two States and Icelandic Prime Minister's statement of 9 November 1971.²³⁰⁾ On the basis of this recognition, the Court's point of departure for an equitable solution of the case is as follows:

"It follows from the reasoning of the Court in this case that in order to reach an equitable solution of the present dispute it is necessary that the preferential fishing rights of Iceland, as a State specially dependent on coastal fisheries, be reconciled with the traditional fishing rights of the Applicant."²³¹⁾

But in the opinion of the Court such reconciliation cannot be effected by a phasing-out of the Applicant's fishing as was provided in the Exchange of Notes of 1961; "it is essentially a matter of appraising the dependence of the coastal State on the fisheries in question in relation to that of the other State concerned and of reconciling them in as equitable a manner as is possible".²³²⁾

As may be predicted from such consideration, the Court concludes:

"Due recognition must be given to the rights of both Parties, namely the rights of the United Kingdom to fish in the waters in dispute, and the preferential rights of Iceland. Neither right is an absolute one:



the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation."²³³⁾

6) Proportionality between the continental shelf area and the length of the coastline

In the North Sea Continental Shelf cases of 1969 the International Court of Justice suggested proportionality between the extent of continental shelf areas and the length of the coastline as one of the factors to be taken into account in the negotiations of the parties for an equitable delimitation. After discussing the importance of balancing-up of all the relevant circumstances or considerations, the Court states that in balancing the factors in question "it would appear that various aspects must be taken into account".²³⁴⁾ It is in this context that the Court refers to the element of proportionality, as well as the doctrine of the continental shelf being an appurtenance of the land territory and the unity of deposits:

"A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines,--these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very

irregular coastlines to their truer proportions."235)

This is repeated, with some modifications in the wording, in the dispositif of the judgment with the addition of a clause reading: "account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region".236)

This seems to be the first time that any judicial or arbitral decision has ever propounded the element of proportionality in such a meaning as in this case. Given the geographical situation of the three parties with coastlines of roughly the same length, though the sandwiched German coast being concave and the adjacent Danish and Dutch coasts convex, the element of "a reasonable degree of proportionality" between the share of the continental shelf and the length of the coast measured in its general direction sounds an equitable factor to be taken into account.237) But this is not free from ambiguity. The Court only presented it as such a factor, and left the "choice and application of the appropriate technical methods" for the parties.238)

The idea of proportionality was adopted in the Franco-Spanish Convention on the Delimitation of the Continental Shelves of the Two States in the Bay of Biscay of 29 January 1974. Following the territorial sea and contiguous zone boundary line, the continental shelf boundary line was drawn in two main sections. The first section, immediately following the territorial sea and contiguous zone boundary line, is an equidistance line based on the normal baselines of the parties. The second section is a negotiated straight line drawn in a manner in which the ratio of the "artificial coastlines" of the parties is reflected in the division of the continental shelf area in this part of the Bay of Biscay. The ratio of such artificial coastlines being calculated 1:1.541 between Spain and France, the boundary line of the second section was so drawn as to apportion the continental shelf area at this ratio to the parties.239) Allowing for the fact that

this is the result of an agreement between the parties, and not a judicial or arbitral decision, the idea of proportionality was the basic principle upon which the delimitation was effected, rather than a mere factor taken into account in the delimitation process.

In the Anglo-French Continental Shelf case of 1977, the Court of Arbitration touches on proportionality at the end of its discussion of the applicable law. But the Court does not treat it as a general criterion to be applied in all cases:

"... this Court does not consider that the adoption in the North Sea Continental Shelf cases of the criterion of a reasonable degree of proportionality between the areas of continental shelf and the lengths of the coastlines means that this criterion is one for application in all cases. ... In the present case, the role of proportionality in the delimitation of the continental shelf is, in the view of the Court, a broader one, not linked to any specific geographical feature."²⁴⁰⁾

"The factor of proportionality may appear in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines, as in the North Sea Continental Shelf cases. But it may also appear, and more usually does, as a factor for determining the reasonable or unreasonable--the equitable or inequitable--effects of particular geographical features or configurations upon the course of an equidistance-line boundary."²⁴¹⁾

In short,

"Proportionality, therefore, is to be used as a criterion or factor relevant in evaluating the equiteis of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf."²⁴²⁾ (Emphasis added)

Proportionality thus defined was used in the actual delimitation of the continental shelf in the Channel Islands region as the test of equitableness of the delimitation:

"... where the coastlines of two opposite States are themselves approximately equal in their relation to the continental shelf not only should the boundary in normal circumstances be the median line but the areas of shelf left to each Party on either side of the median line should be broadly equal or at least broadly comparable. Clearly, if the Channel Islands did not exist, this is precisely how the delimitation of the boundary of the continental shelf in the English Channel would present itself."²⁴³⁾

In the Tunisia-Libya Continental Shelf case of 1982, proportionality seems to have been used in a similar way to that in which it was used in the North Sea Continental Shelf cases or, in technical terms, in the Franco-Spanish Convention of 1974. The Court thought it necessary first to define the area to be delimited, and considered the parallel of latitude passing through Ras Kaboudia on the Tunisian coast and the meridian of longitude passing through Ras Tajoura on the Libyan coast as affording appropriate seaward limits of that area on account of their cartographic convenience.²⁴⁴⁾ Then the ratio of the lengths of the coastlines of the parties is calculated for the delimitation of the area.

"The Court notes that the length of the coast of Libya from Ras Tajoura to Ras Ajdir, measured along the coastline without taking account of small inlets, creeks and lagoons, is approximately 185 kilometres; the length of the coast of Tunisia from Ras Ajdir to Ras Kaboudia, measured in a similar way, and treating the island of Jerba as though it were a promontory, is approximately 420 kilometres. Thus the relevant coastline of Libya stands in the proportion of

approximately 31:69 to the relevant coastline of Tunisia. It notes further that the coastal front of Libya, represented by a straight line drawn from Ras Tajoura to Ras Ajdir, stands in the proportion of approximately 34:66 to the sum of the two Tunisian coastal fronts represented by a straight line drawn from Ras Kaboudia to the most westerly point of the Gulf of Gabès, and a second straight line from that point to Ras Ajdir. With regard to sea-bed areas, it notes that the areas of shelf below low-water mark within the area relevant for delimitation appertaining to each State following the method indicated by the Court stand to each other in approximately the proportion: Libya 40; Tunisia 60. This result, taking into account all the relevant circumstances, seems to the Court to meet the requirements of the test of proportionality as an aspect of equity."²⁴⁵⁾

The Court presents proportionality as one of the five listed relevant circumstances to be taken into account in achieving an equitable delimitation.²⁴⁶⁾ The wording of this clause on proportionality is almost the same as that in the judgment of the North Sea cases.

It would be interesting to note the criticism against the Court's finding on proportionality as exceeding the modest role it should properly play. Judge ad hoc Jiménez de Aréchaga, who voted in favour of the judgment, stresses that it constitutes "a test to be applied ex post facto to the results obtained through the appreciation of the relevant circumstances, and not a relevant circumstance or independent factor itself".²⁴⁷⁾ Judges Gros and Oda and Judge ad hoc Evensen, all dissenters, express their criticism, saying, "The present Judgment drastically alters the restricted role which properly belongs to the proportionality factor",²⁴⁸⁾ "In conclusion, proportionality may have to be gauged simply by eyeing the area concerned as a whole, from a very broad macro-geographical standpoint, rather than with an eye to establishing any predetermined ratio in the apportionment

of the area",²⁴⁹⁾ and "... the Court in the present case seems to have gone much farther in almost elevating the proportionality test--applied as a mathematical formula--to the status of international law",²⁵⁰⁾ respectively.

In the Gulf of Maine case of 12 October 1984 between Canada and the United States, the Chamber of the International Court of Justice took proportionality into account in the delimitation of the second segment of the boundary line, although it said it was aware that "to take into account the extent of the respective coasts of the Parties concerned does not in itself constitute either a criterion serving as a direct basis for a delimitation, or a method that can be used to implement such delimitation".²⁵¹⁾ The Chamber noted that "the length of the coasts belonging to the United States ... is considerably greater than that of the coasts belonging to Canada, even if part of the Bay of Fundy coasts is included in the calculation of this perimeter [of the Gulf]. This difference in length is a special circumstance of some weight, which, in the Chamber's view, justifies a correction of the equidistance line, or of any other line."²⁵²⁾

Thus the Chamber took into account part of the Bay of Fundy coastlines, which are wholly Canadian, in adjusting the median line between the Nova Scotian coast and the Massachusetts coast which face each other.²⁵³⁾ This was done much as in the Tunisia-Libya Continental Shelf case of 1982 and the Franco-Spanish agreement of 1974.

Proportionality was taken into account as a factor justifying a correction of the median line in a situation of two opposite coasts in the Libya-Malta Continental Shelf case of 3 June 1985. In the defined area to be delimited the Libyan coast extends 192 miles and the Maltese coast 24 miles, or in the proportion of 8 to 1, which in the view of the International Court of Justice constitutes a relevant circumstance that should be reflected in the drawing of the delimitation line.²⁵⁴⁾ In other words, the difference in the coastal lengths is "so great as to justify the adjustment of the median line so as to attribute a larger

shelf area to Libya".²⁵⁵⁾

In the view of the Court the proportionality 'factor' arises from the equitable principle that nature must be respected.²⁵⁶⁾ The very basis of the legal regime of continental shelf lies in the coastal State's sovereignty over its land territory, as the idea is expressed in the adage that "the land dominates the sea".²⁵⁷⁾

The Court, however, does not apply proportionality as a criterion of delimitation, but rather takes the disparity or disproportion in the length of the relevant coasts into account for an equitable delimitation.²⁵⁸⁾ Another factor which the Court thinks to be relevant is the "considerable distance" between the Maltese and Libyan coasts. This is "an obviously important consideration when deciding whether, and by how much, a median line boundary can be shifted without ceasing to have an approximately median location, or approaching so near to one coast as to bring into play other factors such as security".²⁵⁹⁾ What the Court does on the basis of these considerations is to draw a fictitious median line between Italy and Libya which intersects the meridian 15°10'E at about latitude 34°36'N and makes it the northern limit of transposition, while drawing the median line between Malta and Libya which intersects that same meridian at about 34°12'N. The Court shifts the Malta-Libya median line northwards through 18 minutes of latitude or three-quarters of the latitudinal difference between the two median lines.²⁶⁰⁾

But the transposition by so much of latitude is not related mathematically to the ratio of lengths of the two opposite coasts, as the drawing of the delimitation line was to the relevant coasts in the Tunisia-Libya Continental Shelf case of 1982 and the Gulf of Maine case of 1984. The Court justifies its method of delimitation as an equitable one in these words:

"The conclusion to which the Court comes in this respect is that there is certainly no evident disproportion in the areas of shelf attributed to each of the Parties respectively such that it could be said

that the requirements of the test of proportionality as an aspect of equity were not satisfied."²⁶¹)

(3) Equitable considerations praeter legem

1) Recourse to equity in the absence of law

a) Recourse to equity by reason of careful weighing of the claims and supporting evidence being impossible

In the British Guiana-Venezuela Boundary case of 1899, the compromis of 2 February 1897 laid down three rules for the basis of decision:

"... the Arbitrators shall ... be governed by the following Rules, which are agreed upon by the High Contracting Parties as Rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to be applicable to the case:--

Rules

(a) Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

(b) The Arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the Arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule.

(c) In determining the boundary-line, if territory of one Party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as

reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require."²⁶²⁾

The basis of decision is, on the whole, the law. But inasmuch as Rule (c) provides that "such effect shall be given to" the actual occupation of territory "as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require", equity is included in the basis of decision.

Interpretation of this provision, however, was divided between the parties. According to the British interpretation, the Tribunal has an absolute discretion. It may deflect the boundary line for what it deems to be an equitable compensation for the delimitation; or make one or the other party pay a compensation for the delimitation.²⁶³⁾ It may, under this rule, if reason, justice, equity and the principles of international law justify it, draw a give and take line although in drawing that give and take line it may give to Venezuela that which strictly belongs to Great Britain, or give to Great Britain that which belongs to Venezuela.²⁶⁴⁾

Venezuela interprets the provision restrictively. What the Tribunal can do in the way of adjusting the equities or in the way of compensation is to prevent any consideration from resulting in "a change in the boundary line as fixed".²⁶⁵⁾ Rule (c) does not contemplate the fixing of a give and take line, giving here and taking there.²⁶⁶⁾

The award, handed down on 3 October 1899, is not accompanied by a statement of reasons upon which it is based, but merely sets out the Treaty of Arbitration in full, recites the preliminary proceedings and determines the boundary. Consequently it is unknown whether, and if so how far, equitable considerations were given in the examination of the claims of the parties and their supporting documents. But from a perusal of the Cases and Counter-Cases, the Proceedings and the fact that the award was read within a week after the last day of the three-

month oral arguments on 27 September 1899, it could be inferred that the tribunal failed, or was unable, scrupulously to weigh the respective claims of the parties and the supporting documents, which exceeded 2,650 in number.²⁶⁷⁾ It would seem, nevertheless, that at least some consideration was given to strike the balance between the claims, awarding to Great Britain the major part of the disputed territory and attributing to Venezuela the strategically important right bank of the mouth of the Orinoco.²⁶⁸⁾

Both in the pleadings and the oral arguments the debate centred on "discovery, occupation, possession and abandonment", in the words of Lauterpacht.²⁶⁹⁾ Briefly, the respective claims of the parties were as follows. The Venezuelan claims were: (i) Spain discovered Guiana; hence the territory was not terra nullius; any nation coming subsequently to claim title must acquire it by conquest, cession or prescription;²⁷⁰⁾ and (ii) Requirements of corpus and animus should be strictly applied to the claims of the Dutch and the British as conflicting with their good and original title.²⁷¹⁾ The British claims were: (i) Discovery is a mere entitlement to the right of effective occupation within a reasonable period of time, and the power which subsequently occupies the territory with effective control obtains an absolute title;²⁷²⁾ (ii) There was not such an extent of practical control and possession on the part of either Holland or Spain as to create a presumption of perfect title;²⁷³⁾ and (iii) Private law may be resorted to as against the Venezuelan contention founded on first discovery.²⁷⁴⁾

So far as the effective control of the area extending between the Essequibo in the east and the Orinoco in the west was concerned, the parties submitted a huge volume of documents in support of their respective claims. They argued mainly on the basis of their relevant official acts, and especially placed emphasis on the proving of their political control over the area concerned.²⁷⁵⁾ They also relied on their people's private acts and activities, including inter alia Spanish settlements of missions,²⁷⁶⁾

agricultural, fishing and trading activities.²⁷⁷⁾

Although the tribunal did not find the documents effective enough to support the claims of the parties and to convince it of the effective control of the disputed area by either of them, it is proposed here to venture a comparison of the claims and allegations of the parties. The history of the territory is divided into six periods for the sake of analytical convenience.

1) Prior to the Treaty of Münster of 1648

During this period almost any claim of one party is refuted by the other. Venezuela maintains that there were Spanish settlements in Santo Thomé in 1596, while Britain contends that Spain had no settlements before 1596 in Guiana and that from 1596 up to 1723 Santo Thomé was the only Spanish settlement on the south bank of the Orinoco.²⁷⁸⁾ While Venezuela says Spain maintained colony on the Essequibo as late as 1615 or even 1618, Britain denies it, contending that all the Spaniards did was to visit the Essequibo just as the Dutch and the English did and that the Spaniards were not on the Essequibo after 1618. Instead, Britain says, the Dutch had settlements between the Corentin and the Orinoco at least as early as 1623. To the Venezuelan allegation that Spain had excluded all other nations from the disputed territory as late as 1625, Great Britain faltly denies that it was true. As against the British contention that Dutch trade dated back to before 1625, Venezuela objects that the Dutch traded to the Essequibo not earlier than 1625.²⁷⁹⁾

2) At the time of the Treaty of Münster in 1648

The Dutch holdings were limited to Kykoveral on the Essequibo, according to Venezuela, but Britain maintains that the Dutch were in possession of the greater part of the coast from the Orinoco to the Amazon and had control of all rivers flowing into the Atlantic except the Orinoco.²⁸⁰⁾

3) The period between 1648 and 1814 when the three Dutch colonies were ceded to Great Britain

Concerning the Spanish activities during the period, Venezuela appears to be comparatively reticent. Britain

has very much to say about the Dutch activities: (i) In 1684 the Dutch held "a small shelter" at Barima, a strategic point at the mouth of the Orinoco;²⁸¹⁾ (ii) In 1714, the year of the Treaty of Utrecht, the Dutch were the master of the territory extending to Barima in the north and beyond the Cuyuni in the northwest;²⁸²⁾ (iii) The Dutch sent complaints to Spain about the capture of some Dutch fishing boats in the Orinoco and the alleged establishment of a Mission in the Cuyuni in 1746, and some other complaints in 1759, 1769 and 1775 respectively, all of which were not responded to properly by Spain;²⁸³⁾ (iv) In 1749 the Commander at Essequibo said that Barima was under his jurisdiction;²⁸⁴⁾ (v) In 1755 and 1790 there were reports that the Dutch had alliance with the natives;²⁸⁵⁾ (vi) In a report of 1764 and letter of 1768 it was shown that the Colony of Essequibo included Barima and Waini;²⁸⁶⁾ (vii) From 1781 to 1802 the British tried to seize the Dutch colonies off and on, the French intervening;²⁸⁷⁾ (viii) On December 3, 1802 the colonies were restored to the Dutch by the Peace of Amiens, the Dutch sovereignty proclaimed on December 20;²⁸⁸⁾ (ix) In September, 1803 Colonies of Essequibo, Demerary and Berbice were retaken by the British;²⁸⁹⁾ (x) In 1804 British postholders seem to have been stationed in Upper Essequibo, Moruka and Mora;²⁹⁰⁾ and (xi) In 1805 a Post existed in Massaruni, further inland.²⁹¹⁾

4) From the cession in 1814 to the first Schomburgk line of 1840

Britain claims that at the time of the Dutch cession of the three Colonies to Britain as a result of the Treaty of 1814, Spain raised no question of boundary although it had been reported to the Spanish Government that the English apportioned the lands taken from the Dutch as far as the Orinoco.²⁹²⁾

In 1836, according to Venezuela, British Consul at Angustura and Minister at Caracas admitted that Barima Point was under Venezuela's exclusive jurisdiction. British Minister at Caracas even requested Venezuela to erect a lighthouse at Barima Point.²⁹³⁾ Britain responds

by saying that such request was made without authority and knowledge of the British Government, that it was not acted upon by Venezuela nor was the fact of its having been made communicated to the British Foreign Office. Britain claims that there was no copy of any such note among the papers in the possession of the Foreign Office, repeating that there was no evidence of Venezuela having controlled Barima Point at that or any other time, the incident having no bearing upon the question of right.²⁹⁴⁾

In 1838, Britain says, Superintendents of Rivers and Creeks were created to work as Magistrates throughout the disputed territory.²⁹⁵⁾

In 1839 Schomburgk proposed to the British Government to survey a boundary line. His original line was approved by Britain in 1840.²⁹⁶⁾

5) From the 1840 Schomburgk Line to the 1850 Arrangement

In 1841 Venezuela protested to Britain against the Schomburgk line.²⁹⁷⁾ Venezuela maintains that in a confidential letter of Schomburgk dated October 23, 1841 to Governor Light of Guiana, he pointed out the importance of Barima Point.²⁹⁸⁾ Lord Aberdeen agreed that Barima and Amakuru posts set up by Schomburgk should be removed.²⁹⁹⁾

In 1850 an agreement, in Venezuela's wording, was concluded with Britain that pending the settlement of the boundary, neither side should occupy or encroach upon the disputed territory. Britain admits that there was an "arrangement" made with Venezuela, but that no definition was made of the disputed territory, consequently that Britain was free to develop the country east of the Schomburgk line.³⁰⁰⁾

6) Subsequent to 1850

Venezuela repeatedly complains of British violations of the 1850 "agreement" and the terms of the Treaty of Münster. It mentions, in support of its complaints, the Proclamation by the Colonial authorities of British Guiana of January 30, 1867, to show British commitment to adhere to the 1850 "agreement".³⁰¹⁾

Britain protests against Venezuelan concessions of

disputed territory to foreigners in 1881-1884 and 1886.³⁰²⁾

In 1886 the Schomburgk line was expanded, according to Venezuela,³⁰³⁾ but Britain says the 1886 line was observed till in 1894 Venezuela destroyed the British station in Uruan, set up in 1891-1892.³⁰⁴⁾

When read in the light of the foregoing, the award of 3 October 1899 would seem to tell something which the tribunal is presumed to have taken into account in determining the boundary. The tribunal awarded Barima Point, Amacura Point on the right bank of the mouth of the Orinoco, and the area west of the Wenamu to Venezuela.³⁰⁵⁾ It could be inferred that the determination was based on the British consent in 1841 that, possibly in response to the Venezuelan protest against the 1840 Schomburgk line, the Barima and Amacura posts set up by Schomburgk should be removed without prejudice to the British claim on the one hand and the Spanish missionary settlements and activities in the west-northwest of the Wenamu-Cuyuni on the other.³⁰⁶⁾ Otherwise the awarded boundary line seems to follow, in its greater parts, the Schomburgk line of 1886. President of the tribunal, Professor F. de Martens, in an interview with Reuter's correspondent, is reported to have said: "The boundary line which has been laid down by the judges is a line based on justice and law. The judges have been actuated by a desire to establish a compromise in a very complicated question, the origin of which must be looked for at the end of the 15th century."³⁰⁷⁾

In the Bolivia-Peru Boundary case of 1909, what the arbitrator believed to be an equitable boundary line was determined without the claims of the parties and the supporting evidence being carefully weighed. The compromis of 30 December 1902 stipulates that the arbitrator should act "in conformity with the laws in the Collection of Statutes of the Indies, Royal Letters Patent and Orders ... Ordinances of the Provincial Governors, diplomatic instruments relating to the demarcation of the frontiers, official maps and descriptions, and generally, with such documents of official character as may have been issued".³⁰⁸⁾ But it gives the arbitrator an additional

guide, which reads:

"Wherever the royal enactments or dispositions do not define the right of possession to a territory in a clear manner, the Arbitrator shall decide the question equitably, keeping as far as possible to their meaning and to the spirit which inspired them."³⁰⁹⁾

The President of Argentina, nominated the arbitrator, set up an Advisory Commission to examine the question in detail. The Commission came to the conclusion that the laws, ordinances and other relevant documents could not precisely determine the boundary in the disputed territory, and reported to the president accordingly.³¹⁰⁾ Based on its report, the arbitrator found himself obliged to observe, "the Arbitrator does not find any sufficient ground for considering, as dividing line between the Audiencia of Charcas and the Viceroyalty of Lima in the year 1810, one or the other of the demarcations claimed in the respective pleadings of the States concerned,"³¹¹⁾ and further

"That, under these circumstances there must be strictly applied to the case the provisions of Article IV of the Treaty of Arbitration, which states: 'Wherever the Royal enactments or dispositions do not define clearly the right of possession to a territory, the Arbitrator shall decide the question equitably, keeping as close as possible to their meaning and to the spirit which inspired them.'"³¹²⁾

Thus the arbitrator rests his decision on equity, stating:

"... in accordance with the preceding considerations, I must decide this question in an equitable manner, keeping in mind, in this present decision, the significance of the Royal Orders invoked in the respective pleadings and the spirit which has inspired them."³¹³⁾

While on the face of it the arbitrator followed the provisions of the compromis, some commentators indicate that he exceeded his powers in acting as a judge of equity.³¹⁴⁾ Perhaps one may be justified in getting the impression that the arbitrator had recourse to equity a little too easily, because he failed to show in his award that he tried to "keep as close as possible to the meaning of the documents and to the spirit which inspired them" in deciding the question "equitably", as he was obligated to under Article 4 of the compromis.

b) Choice of a natural frontier in the absence of reliable historical and legal claims to found sovereignty

In the Brazil-British Guiana Boundary case of 1904, the arbitrator was governed under the compromis by "such principles of international law as he shall determine to be applicable to the case".³¹⁵⁾ As he was unable to decide on the basis of legal considerations, however, he seems to have resorted to considerations of equity in adopting a natural frontier under his obligation to decide the boundary.

From the documents produced to the arbitrator, which he says have been "weighed and duly considered",³¹⁶⁾ it does not appear that "there are historical and legal claims on which to found thoroughly determined and well-defined rights of sovereignty in favour of either of the contending Powers over the whole territory in dispute, but only over certain portions of the same". He concedes that "it cannot either be decided with certainty whether the right of Brazil or of Great Britain is the stronger".³¹⁷⁾ Thus he comes to the conclusion:

"In this condition of affairs, since it is our duty to fix the line of frontier between the dominions of the two Powers, We have come to the conclusion that, in the present state of the geographical knowledge of the region, it is not possible to divide

the contested territory into two parts equal as regards extent and value, but that it is necessary that it should be divided in accordance with the lines traced by nature, and that the preference should be given to a frontier which, while clearly defined throughout its whole course, the better lends itself to a fair decision of the disputed territory."³¹⁸⁾

In following the water courses as a "fair decision", the arbitrator chooses the "thalweg" for a natural or neutral way of delimitation.³¹⁹⁾ In short, as historical and legal considerations proved unable to decide the case, the arbitrator relied on natural features which appeared to him to provide a "fair decision" under the circumstances.

Although the arbitrator states that he "weighed and duly considered" the documents submitted, he does not show how he did so in the text of the award. It is therefore susceptible to criticism such as Fauchille's. In a comprehensive study of this arbitration by the King of Italy, the French lawyer sees the role of an amiable compositeur in the way the arbitrator decided the case:

"Il semble bien, si on lit l'article 3 du compromis, qu'il ne devait tracer la ligne frontière entre les deux Etats, que d'après les droits qu'il aurait reconnus à chacun d'eux soit sur la totalité, soit sur une partie de la zone en litige. ... En définitive, en agissant comme il l'a fait, le Roi d'Italie a procédé comme amiable compositeur, alors que le compromis ne lui en attribuait pas réellement la faculté. C'est seulement dans la mesure des droits reconnus à l'une ou à l'autre partie que l'arbitre pouvait fixer la frontière des Guyanes."³²⁰⁾
(Emphasis in original)

Fauchille further states that even if the arbitrator had been authorized to act as an amiable compositeur, he failed to adopt the right solution in conformity with the principle of natural frontiers following the water-shed of

the range of mountains, if partially, in the northern part of the disputed territory.³²¹⁾

The Anglo-Portuguese Barotseland Boundary case of 1905 would seem to afford an instance of awarding the "lignes de convention géographiques" on the ground that a precise delimitation is impossible for a couple of reasons. Under the compromis of 1903 the King of Italy as the arbitrator had no basis of decision provided for him. Stating that he had carefully examined the mémoires and other relevant documents presented by the parties in a similar way to that he stated in his award of 1904 in the Brazil-British Guiana Boundary case,³²²⁾ the arbitrator reasoned as follows:

"... en ce qui concerne la délimitation du territoire sur lequel le Roi Lewanika régnait comme Chef Suprême, toute délimitation précise est impossible, soit à cause de la connaissance imparfaite qu'on a des lieux, soit à cause de l'instabilité notoire des tribus et de leurs fréquents entrelacements (circonstances qui ont été admises par le Marquis de Salisbury et le Marquis de Lansdowne), de sorte que, il est indispensable, où les lignes naturelles font défaut, d'avoir recours aux lignes de convention géographiques."³²³⁾

It may be noted that the above finding, as well as the others which preceded it, was made "en droit"³²⁴⁾ and not "en équité". Yet the Italian King's award, as above quoted, does seem to be an equitable decision taking account of the various local circumstances in the absence of decisive legal considerations.

- c) According to equity and justice, uti possidetis of 1821 being unable to define the boundary

In the Guatemala-Honduras Boundary case of 1933, the tribunal proceeding on the not altogether clear basis of decision, found itself obliged to have recourse to equity and justice on the ground that the line of uti possidetis

of 1821 was not established. While the primary function of the tribunal was to determine the line of the uti possidetis of 1821, it was accorded certain discretion to deviate from such line:

"The High Contracting Parties are agreed that the only line that can be established de jure between their respective countries is that of the Uti Possidetis of 1821. Consequently it is for the Tribunal to determine this line. If the Tribunal finds that either Party has during its subsequent development acquired beyond this line interests which must be taken into consideration in establishing the final frontier, it shall modify as it may consider suitable the line of the Uti Possidetis of 1821 and shall fix such territorial or other compensation as it may deem equitable for one Party to pay to the other."³²⁵⁾

From the latter part of these provisions the tribunal is presumed to have certain latitude of action, which could include equitable consideration of the case before it.

In the examination of the uti possidetis line the tribunal was faced with the different interpretations of the content of this Latin expression between the parties. Guatemala contended that the line should be drawn "in conformity with a fact rather than a theory, the fact being what the Spanish monarch had himself laid down, or permitted, or acquiesced in, or tolerated, as between Province and Province, in 1821". Honduras insisted that the expression meant "uti possidetis juris", and that "a line could not be considered as being juridically based on a uti possidetis de facto".³²⁶⁾ An examination of the historic utilization of the expression in Latin American settlements to which the parties invited attention, and of the view of the eminent jurists on the use of the phrase, however, fails to disclose such a consensus of opinion as would establish a definite criterion for the interpretation of the phrase.³²⁷⁾ Reference to former treaties between

the parties relating to the same boundary controversy and mediation proceedings of 1918-1919 under the auspices of the United States does not clarify the matter either.³²⁸⁾

The tribunal divides the disputed territory into some parts to see if the uti possidetis line can be established in each of them. In four such areas the tribunal fails to find the uti possidetis line established due to the lack or insufficiency of evidence, and has recourse to equity.

i) Omoa area:

"... Hence, the evidence affords no sufficient basis for drawing the line of uti possidetis of 1821 so as to include Omoa in either Guatemala or Honduras.

"It should be added that the fact that Omoa had been part of the territory of Honduras, and had been segregated solely for the purpose of a special royal regime which had terminated, is undoubtedly a fact which will require appropriate consideration in determining the boundary between the two Republics on the basis of equity and justice."³²⁹⁾

ii) The Cuyamel area:

"In view of the lack of proof as to the exercise of administrative control during the colonial period by either the Province of Guatemala or Honduras, and of the absence of any recognized boundary line in this region, and of the special situation of Omoa at the time of independence, it is impossible for the Tribunal to establish the line of uti possidetis of 1821 so as to include the Cuyamel area, as described above, either in Guatemala or in Honduras.

"Again, in this instance, the later circumstances disclosed must be taken into consideration in fixing the definitive boundary between the two Republics as equity and justice may require."³³⁰⁾

iii) The Motagua valley:

"In the absence of royal delimitation, or of evidence of the exercise of administrative control, or of satisfactory proof of a recognized boundary, the Tribunal is not at liberty to allocate the territory

in question, that is, the region lying between the Motagua river and the Merendon range and extending from the lands of Quirigua, near the confluence of the Managua and Motagua rivers, to the Cuyamel area, to either Party on the basis of a line of uti possidetis of 1821. Subsequent developments in this region and the corresponding equities of the respective Parties demand, however, proper recognition in determining the definitive boundary which should be established between them in this territory according to equity and justice."³³¹⁾

iv) The Managua-Motagua confluence to El Salvador (embracing the Copan region)

"As already observed, the former Treaties did not use the expression uti possidetis, and in endeavouring to determine the line of uti possidetis of 1821, the Tribunal cannot be deemed to be bound by proceedings under earlier Treaties with their particular requirements. However, in establishing the definitive boundary according to equity and justice, the Tribunal should not fail to give appropriate consideration to antecedent inquiries and reports as to the facts of actual possession at stated times, although such reports may not be regarded as governing the Tribunal in determining developments and possession as these now exist."³³²⁾

Those are preliminary to the decision of the "definitive boundary". In the background of such preliminary considerations would seem to have been the position of the tribunal being obliged to settle the boundary dispute finally. As the tribunal says:

"In the light of the declared purpose of the Treaty, the Tribunal is not at liberty to conclude that the lack of adequate evidence to establish the line of uti possidetis of 1821, throughout the entire territory in dispute, relieves the Tribunal of the duty to determine the definitive boundary to its full

extent. The Tribunal, by the provision of the Treaty as to the line of uti possidetis of 1821, is not required to perform the impossible, and manifestly is bound to establish that line only to the extent that the evidence permits it to be established. And as the Tribunal is expressly authorized in the interests of justice, as disclosed by subsequent developments, to depart from the line of uti possidetis of 1821, even where that line is found to exist, the Treaty must be construed as empowering the Tribunal to determine the definitive boundary as justice may require throughout the entire area in controversy, to the end that the question of territorial boundaries may be finally and amicably settled."³³³⁾

The position of the tribunal being under the obligation to settle the case finally may remind one of that similar position of the arbitrator in the Island of Palmas case of 1928, who decided the territorial sovereignty of the island on the strictly legal basis through a scrupulous weighing of the claims and evidence of the parties.³³⁴⁾ Indeed in the present case, too, a similarly careful weighing of the claims and evidence of the parties is conducted in both of the two main sections of the award: "First. The Line of the 'Uti Possidetis' of 1821" and "Second. The Definitive Boundary".³³⁵⁾

d) Recognition of the existing state of affairs in the absence of clear provisions of a treaty

In the Declaration attached to the judgment in the Frontier Land case of 1959, Sir Hersch Lauterpacht suggested that it would be equitable to give effect to the unchallenged local administrative acts of the Netherlands over a period of fifty years. His Declaration, which sounds like a dissenting opinion, states:

"The Special Agreement of 26 November, 1957 (= the date of submission to the Court's Registrar),

submitting the dispute to the Court is by design so phrased as not to confine its function to giving a decision based exclusively on the Convention of 1843. By the generality of its terms it leaves it open to the Court to determine the question of sovereignty by reference to all relevant considerations--whether based on the Convention or not. Accordingly, in the circumstances, it seems proper that a decision be rendered by reference to the fact, which is not disputed, that at least during the fifty years following the adoption of the Convention there had been no challenge to the exercise, by the Government of the Netherlands and its officials, of normal administrative authority with regard to the plots in question. In my opinion, there is no room here for applying the exacting rules of prescription in relation to a title acquired by a clear and unequivocal treaty; there is no such treaty. It has been contended that the uninterrupted administrative activity of the Netherlands was due not to any recognition of Netherlands sovereignty on the part of Belgium but to the fact that the plots in question are an enclave within Netherlands territory and that, therefore, it was natural that Netherlands administrative acts should have been performed there in the ordinary course of affairs. However, the fact that local conditions have necessitated the normal and unchallenged exercise of Netherlands administrative activity provides an additional reason why, in the absence of clear provisions of a treaty, there is no necessity to disturb the existing state of affairs and to perpetuate a geographical anomaly."³³⁶⁾

Judge Armand-Ugon, in his dissenting opinion, presents a similar view, although based on the absence of protest by Belgium.³³⁷⁾ Judge Moreno Quintana also discloses similar considerations in his dissenting opinion.³³⁸⁾

2) Recourse to equity despite the ostensible application of law

In the Chamizal case of 1911 between Mexico and the United States, the basis of decision was law, for under the compromis the tribunal, an expanded International Boundary Commission with the addition of a third commissioner from Canada, was to act "in accordance with the various treaties and conventions now existing between the two countries, and in accordance with the principles of international law".³³⁹⁾ The parties requested the tribunal to "decide solely and exclusively as to whether the international title to the Chamizal tract is in the United States of America or Mexico", and render a "final and conclusive" decision.³⁴⁰⁾

The two parties agreed under the Treaty of Guadalupe-Hidalgo of 2 February 1848, Article 5, on the middle of the deepest river channel as their boundary line along the international section of the Rio Grande.³⁴¹⁾ But changes in the channel caused by repeated floods necessitated series of surveys in the early part of 1853.³⁴²⁾ Notwithstanding the existence of such changes the Gadsden Treaty of 30 December 1853, Article 1, reiterated the provision of Article 5 of the Treaty of 1848.³⁴³⁾ In 1864 a great flood pushed the channel some distance southward, and Mexico began to claim that such changes did not change the boundary line. Thus a further Boundary Convention was concluded on 2 November 1884. Because of their importance for the arbitration, Articles 1 and 2 of the Convention are reproduced here:

"Article 1: The dividing line shall forever be that described in the aforesaid treaty and follow the centre of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening

of a new one.

"Article 2: Any other change wrought by the force of the current, whether by the cutting of a new bed or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852; but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits."³⁴⁴⁾

As a result of these provisions it was made clear that a change in the channel "effected by natural causes through the slow and gradual erosion and deposit of alluvium" shifts the boundary line, but that in the case of other changes of the channel by more violent natural force such as flooding the boundary line remains where it was fixed in 1852.³⁴⁵⁾

Based on this interpretation the tribunal proceeds to examine the changes in the course of the river. It considers the changes from 1852 to 1864 as "alterations" in the sense of Article 1 of the 1884 Convention:

"The presiding commissioner and the Mexican commissioner are of the opinion that the evidence establishes that from 1852 to 1864 the changes in the river, which during that interval formed a portion of the Chamizal tract, were caused by slow and gradual erosion and deposit of alluvium within the meaning of Article I of the convention of 1884."³⁴⁶⁾

But with respect to the changes in the river in 1864 and in the subsequent years, the tribunal regards them differently:

"With respect to the nature of the changes which occurred in 1864 and during the four succeeding years,

the presiding commissioner and the Mexican commissioner are of opinion that the phenomena described by the witnesses as having occurred during that period cannot properly be described as alterations in the river effected through the slow and gradual erosion and deposit of alluvium."³⁴⁷⁾

In the end the tribunal divides the disputed tract into two in accordance with the above finding by drawing the boundary line along the channel of the river as it stood in 1864 before the great flood. But in so doing, the tribunal follows the precedent of Nebraska v. Iowa, a United States domestic case of river boundary:

"In that case the Court found that up to the year 1877, the changes in the Missouri River were due to accretion, and that, in that year, the river made for itself a new channel. Upon these findings it was held that the boundary between Iowa and Nebraska was a varying line in so far as affected by accretion, but that from and after 1877 the boundary was not changed, and remained as it was before the cutting of a new channel. Applying this principle, mutatis mutandis, to the present case, the presiding commissioner and the Mexican commissioner are of opinion that the accretions which occurred in the Chamizal tract up to the time of the great flood in 1864 should be awarded to the United States of America, and that inasmuch as the changes which occurred in that year did not constitute slow and gradual erosion within the meaning of the convention of 1884, the balance of the tract should be awarded to Mexico."³⁴⁸⁾

Perhaps in the minds of the majority of the tribunal there would have been the opinion of Mr. Cushing, Attorney-General of the United States, which they regarded as "the opinion expressed by so high an authority as the Hon. Mr. Cushing upon the very point at issue", and which the Government of the United States consistently adhered to

while some of the higher Mexican officials occasionally concurred with it.³⁴⁹⁾ In reply to the request for an opinion as to whether the boundary line under the treaty of 1853 shifted with changes taking place in the bed of the river or whether the line remained constant, the Attorney-General, after a consideration of the provisions of the treaty and examination of a great number of authorities upon the subject, reported that

"the Rio Grande retained its function of an international boundary, notwithstanding changes brought about by accretion to one bank and the degradation of the other bank, but that, on the other hand, if the river deserted its original bed and forced for itself a new channel in another direction, then the nation through whose territory the river thus broke its way did not lose the land so separated; the international boundary in that case remaining in the middle of the deserted river bed."³⁵⁰⁾

In his dissenting opinion, the American commissioner claimed that the majority opinion departed from the compromis of 1910 by dividing the Chamizal tract, which in his opinion the provision of Article 3 of the compromis did not allow the tribunal to do. He bases his argument on two main grounds: first he invokes Twiss, who says that "a clear departure from the terms of the reference" invalidates an international award;³⁵¹⁾ and secondly he refers to the Orinoco Steamship Co. case before the Permanent Court of Arbitration in which the award states that "excessive exercise of power may consist not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied".³⁵²⁾

The majority opinion concluded that the disputed tract might be divided as a result of the interpretation and application of the Convention of 1884. Its reasoning seems

to be justified by the combined effect of Articles 1 and 2 of the 1884 Convention. Nevertheless it has departed from Article 3 of the compromis. It is hard to imagine that the presiding commissioner was unaware of Article 3 of the compromis. The surmise may possibly be justified that inasmuch as the tribunal was obliged to render a "final and conclusive" decision whether unanimously or by a majority vote, the presiding commissioner might have thought the idea of dividing the disputed tract, based on a reasonable interpretation and application of the Boundary Convention of 1884, hopefully to be a fair compromise for the settlement of the dispute. The surmise would be reinforced by the fact that the authoritative opinion of Attorney-General Cushing, which was consistently adhered to by the Government of the United States, in effect supported the idea of division.³⁵³⁾

In the Argentine-Chile Palena Boundary case of 1966, another instance would seem to be observed of having recourse to equity in the tracing of the boundary line "in accordance with the principles of international law", as laid down in the compromis.³⁵⁴⁾

The question which the Court of Arbitration was requested to consider was:

"To the extent, if any, that the course of the boundary between the territories of the Parties in the Sector between boundary posts 16 and 17 has remained unsettled since the 1902 Award, what, on the proper interpretation and fulfilment of that Award, is the course of the boundary in that Section?"³⁵⁵⁾

From the submissions of the parties, the Court concludes in the first instance that on the basis of the 1902 Award and the 1903 demarcation, the two portions of the course of the boundary were settled as between the parties: between Boundary Post 16 and the Confluence and between Cerro de la Virgen and Boundary Post 17:

"The Court therefore decides that the course of

the boundary between Boundary Post 16 and the Confluence was settled by the 1902 Award and the 1903 demarcation, the settlement being that from Boundary Post 16 on the north bank of the River Palena the boundary shall cross the Palena to the mouth of the River Encuentro: it shall then follow the Encuentro to the Confluence.

"The Court also decides that the course of the boundary between Cerro de la Virgen and Boundary Post 17 was settled by the 1902 Award and the 1903 demarcation, the settlement being that from Cerro de la Virgen the boundary shall follow the local water-parting southwards to the northern shore of Lake General Paz at Boundary Post 17."³⁵⁶⁾

In thus confirming the two parts of the course of the boundary as the common ground of the parties, the Court seems to place primary importance on the geographical feature "Cerro de la Virgen":

"There is no difficulty about identifying the feature referred to in the Award as 'the peak called Virgen', in the Report of the Tribunal as 'Cerro de la Virgen' and in the Award Map as 'C.d.l.Virgen'. This is an outstanding feature and is the highest peak on a north-south line between the River Palena and Lake General Paz. It is important to stress this clear identification of Cerro de la Virgen as Chile has at times suggested that by 'the peak called Virgen' in the Award was meant a mountain lying well to the east of Cerro de la Virgen."³⁵⁷⁾

Now the Court proceeds to the remaining middle portion of the course of the boundary: between the Confluence and Cerro de la Virgen. It considers the very voluminous material submitted by the parties, and especially Chile, which came to be known in this case as the "fulfilment material", but fails to find it of crucial importance.

"But, taken as a whole, the evidence is just what one would expect in any disputed zone. It shows settlers not surprisingly turning to the authorities of both countries in case of need and doing their best to keep good terms with both sides. The evidence is quite insufficient to establish any abandonment by Argentina of her rights under the 1902 Award or any acquisition of title by Chile through adverse possession of territory adjacent to those parts of the boundary line settled in 1902-03. No more, in the Court's view, does the evidence establish that the parts of the line remaining unsettled in 1903 have subsequently become settled in the sense now contended for by Chile."³⁵⁸⁾

What the Court had to do about the disputed portions of the line was to determine the meaning of the words in the 1902 Award "follow the River Encuentro to the peak called Virgen". The Encuentro bifurcates at the Confluence into two channels, one eastern and the other southern/western. In the view of the Court, when the Award does not specify which channel the boundary shall follow, the boundary must, as a matter of principle, follow the major channel. The Court also thinks that it must never lose sight of the fact that the intention of the 1902 Arbitration was to make the boundary follow a river as far as Cerro de la Virgen. These are the two principles which must dominate the Court's approach to the question put to it.³⁵⁹⁾

Based on both historical and scientific grounds, the Court identifies the Eastern Channel as the major channel.³⁶⁰⁾ Thus the boundary line from the Confluence "follows the thalweg of this river to a point where the course of the river begins to deviate from the direction of Cerro de la Virgen, which is a natural boundary mark".³⁶¹⁾ As seen before, in the Court's view, Cerro de la Virgen must never be lost sight of, and therefore the boundary must leave the course of the Eastern Channel at that point to follow the course in the direction of Cerro de la Virgen. Consequently the course of the boundary runs

through the local water-partings of Cerro de la Virgen to link to the undisputed southern part of the boundary line to Boundary Post 17 on the northern shore of Lake General Paz.

On the face of it, therefore, the finding of the Court of Arbitration on this middle portion of the boundary line, between the Confluence and Cerro de la Virgen, seems to be based on the application of the law, which in turn is based on the historical and scientific evidence. But the consequence is that the areas where the Chilean populations lived have in this way been included on the Chilean side of the boundary line. One may well suspect that this is a compromise solution between the claims of the parties, attributing some 71 per cent of the disputed territory to Argentina and giving the remaining 29 per cent to Chile. This smaller area, however, is most propitious to the settled people and economic development.³⁶²⁾ As Professor R. Y. Jennings, one of counsel on behalf of Argentina in the proceedings, later comments:

"Thus, when the Court affirms that the 'fulfilment' material advanced the questions before it 'no further', one is left with the surmise that, though this was no doubt technically so, the fact that those people were in that area was not without its effect on the mind of the Court. And this suspicion is not removed when it is noted from a glance at the map that, though it is true the Award line leaves the line of the 'main channel' at a point where the latter begins to 'deviate markedly' from the direction of the Cerro Virgen, yet the fact is that the deviation towards the wrong direction is as nothing compared with its determinedly eastward course immediately above the confluence. And here the Award line faithfully follows it, deviating all the time most markedly from the direction of the Cerro Virgen. To this extent, therefore, the reasoning leaves an unresolved question in the mind."³⁶³⁾

Such suspicion appears to be supported by the way the Court summarizes the submissions of the parties, reproducing 10 points of the Argentine Memorial and 15 points of the oral arguments of Argentina on the one hand and 13 points, with 8 subsidiary points, of the Chilean Memorial and 50 points of the Chilean oral arguments.³⁶⁴⁾ The Chilean pleadings and oral arguments apparently surpass the Argentine pleadings and oral arguments. This is, of course, due to the respective volumes of the submissions of the parties, but would in fact seem to endorse the submissions of Chile in respect of the "fulfilment" aspect, rather than the Argentine argument that activities of a private or local administrative nature should not be taken into account. The Court explicitly supports this position of Argentina, and yet, by faithfully reproducing the parties' submissions and weighing them with care, it may virtually have paid equitable attention to the fact that the disputed territory was mainly populated by the Chilean settlers.³⁶⁵⁾

In yet another, more recent case of maritime delimitation by the International Court of Justice, a similar reasoning may be discerned. When the Chamber of the Court, constituted for the first time in its history for the Gulf of Maine case of 1984 between Canada and the United States, says that it applied "the fundamental norm of customary international law governing maritime delimitation" requiring "the application of equitable criteria and the use of practical methods capable of ensuring an equitable result",³⁶⁶⁾ it may be suspected that the Chamber did in fact apply in its delimitation process what it professed to be a criterion or criteria by which it would verify whether the result reached was equitable.

Acting "in accordance with the principles and rules of international law applicable in the matter as between the Parties",³⁶⁷⁾ the Chamber finds the law applicable in this case to be an equal division of the areas of convergence and overlapping of the maritime projections of the coastlines of the States concerned in the delimitation, combined with the parallel and partial adoption of the appropriate auxiliary criteria necessitated by the relevant

circumstances of the area concerned.³⁶⁸⁾ Of the three segments of the delimitation line, the controversial one is the third seaward segment that crosses Georges Bank, the real subject of the dispute because of its fisheries and hydrocarbon potential. In determining this segment of the line, the Chamber does not consider that the respective scale of activities of the two States connected with fishing, navigation, defence or petroleum exploration and exploitation can be taken into account as a relevant circumstance or an equitable criterion.³⁶⁹⁾ Thus, ostensibly, those factors were excluded from consideration in the decision of the third segment of the delimitation line.

Yet, in the verification of the equitableness of the result thus reached, the Chamber would seem to concede the suspicion that concern for the economic interests of the populations concerned was not without its effect on its mind in delimiting the boundary line. For the Chamber says:

"What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned."³⁷⁰⁾

3) Recommendation of post-award measures

a) Consideration for complaints of one party about the domestic legislation of the other

In the North Atlantic Coast Fisheries case of 1910, the tribunal recommended a set of rules under which all questions that might arise in the future regarding the

liberties to take, dry and cure fish might be decided. These rules seem to have taken some equitable considerations into account.

The tribunal reduces the first of the seven questions brought before it into two main formulations: (i) "Whether the right of regulating reasonably the liberties conferred by the Treaty of 1818 resides in Great Britain"; and (ii) "If such right does so exist, whether such reasonable exercise of right is permitted to Great Britain without the accord and concurrence of the United States."³⁷¹ On these two questions the tribunal decides and awards as follows:

"The right of Great Britain to make regulations without the consent of the United States, as to the exercise of the liberty to take fish referred to in Article I of the Treaty of October 20th, 1818, in the form of municipal laws, ordinances or rules of Great Britain, Canada or Newfoundland is inherent to the sovereignty of Great Britain.

The exercise of that right by Great Britain is, however, limited by the said Treaty in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be made bona fide and must not be in violation of the said Treaty."³⁷²

Further, pursuant to the provisions of Article 4 of the compromis, which directed it to recommend for the consideration of the parties rules and a method of procedure to determine all the questions that might arise in the future regarding the liberties,³⁷³ the tribunal recommended a set of rules and such a method of procedure. The rules are:

"1. All future municipal laws, ordinances or rules for the regulation of the fishery by Great Britain in respect of (1) the hours, days or seasons when fish may be taken on the Treaty coasts; (2) the method, means and implements used in the taking of fish or in

carrying on fishing operations; (3) any other regulation of a similar character shall be published in the London Gazette two months before going into operation.

Similar regulations by Canada or Newfoundland shall be similarly published in the Canada Gazette and the Newfoundland Gazette respectively.

"2. If the Government of the United States considers any such laws or regulations inconsistent with the Treaty of 1818, it is entitled so to notify the Government of Great Britain within the two months referred to in Rule No.1.

"3. Any law or regulation so notified shall not come into effect with respect to inhabitants of the United States until the Permanent Mixed Fishery Commission has decided that the regulation is reasonable within the meaning of this award."³⁷⁴⁾

In short, Great Britain was clearly awarded the right to make regulations without the consent of the United States, but the right was not unlimited. It was laid down that any such regulations should be published in official gazettes so that the United States might have a chance to know them and have a say about them. It is interesting to note the comment of Robert Lansing, one of counsel on behalf of the United States Government:

"While the Tribunal declared the sovereignty of Great Britain to be complete over the fisheries, it so effectually limited its exercise that the treaty rights of the United States are as fully protected as if the American contentions had been sustained. Great Britain won a technical victory upon the law, but the United States, from an industrial standpoint, won a far more valuable and substantial one upon the facts."³⁷⁵⁾

b) Desirability of consultation with local inhabitants with a view to possible modification of the boundary

In the Armenia-Turkey Boundary case of 1920, the arbitrator gave an equitable consideration for a possible post-arbitration measure, as well as taking into account the relevant tribal relations and movements in his decision itself. Under Article 89 of the Peace Treaty of Sèvres of 10 August 1920 President Woodrow Wilson was invited to decide the frontier between Turkey and Armenia in the Vilayets of Erzerum, Trebizond, Van and Bitlis.³⁷⁶⁾ In his letter of 22 November 1920 to the President of the Supreme Council of the Allied Powers, which originally invited President Wilson to act as arbitrator on 26 April 1920, he explained the principles which he took into account in the delimitation of the boundary. While conceding that the existing ethnic and religious distribution of the populations in the four vilayets were not regarded as the guiding element of the direction,³⁷⁷⁾ the arbitrator seems to have laid some, if minor, attention to the integrity of tribal groupings. In his own words:

"The conflicting territorial desires of Armenians, Turks, Kurds and Greeks along the boundaries assigned to my arbitral decision could not always be harmonized. In such cases it was my belief that consideration of a healthy economic life for the future state of Armenia should be decisive. Where, however, the requirements of a correct geographic boundary permitted, all mountain and valley districts along the border which were predominantly Kurdish or Turkish have been left to Turkey rather than assigned to Armenia, unless trade relations with definite market towns threw them necessarily into the Armenian State. Whenever information upon tribal relations and seasonal migrations was obtainable, the attempt was made to respect the integrity of tribal groupings and nomad pastoral movements."³⁷⁸⁾

In addition the arbitrator suggested to the Boundary Commission, in regard to one portion of the frontier, "the desirability of consulting the local inhabitants with a view to possible modification of the vilayet boundary at this point". He ventured to call the attention of the Boundary Commission to such desirability, because under his mandate "I am not empowered to change the administrative boundary at this point, and these 40 square kilometers of territory lie outside the four vilayets specified in Article 89 of the Treaty of Sèvres."³⁷⁹⁾

(4) Extra-legal considerations of an equitable nature

- 1) Express reference to equity: award to be rendered in equity, the arbitrators having to proceed ex aequo et bono

In the Bolivia-Paraguay Chaco case of 1938 the tribunal was directed to decide the boundary in equity, acting ex aequo et bono and in conformity with the clauses of the compromis. The "Traité de Paix, d'Amitié et de Frontières" of 21 July 1938, after declaring that peace is established between the parties in Article 1, provides in Article 2:

"La ligne frontière dans le Chaco entre la Bolivie et le Paraguay (le Paraguay et la Bolivie) sera déterminée par les Présidents des Républiques suivantes: Argentine, Brésil, Chili, Etats-Unis d'Amérique, Pérou et Uruguay, en leur qualité d'arbitres selon l'équité, lesquels, agissant ex aequo et bono, formuleront leur décision arbitrale conformément à la présente clause et aux clauses ci-après: ..." ³⁸⁰⁾

There was another guide for the arbitrators. Article 3 lays down:

"Les arbitres se prononceront après avoir entendue les Parties et en toute conscience, compte tenu de

l'expérience acquis par la Conférence de la Paix et des avis formulés par les assesseurs militaires de ladite conférence. ..."³⁸¹⁾

The tautologically worded basis of decision is confirmed by the arbitrators, who state in the award:

"... par l'article 2 du Traité de paix, d'amitié et de frontières susvisé, la Bolivie et le Paraguay ont stipulé que la sentence sera rendues en équité, les arbitres devant agir ex aequo et bono."³⁸²⁾

This is how it was applied:

"... les arbitres ont tenu compte de l'expérience acquise par la Conférence de la Paix, ainsi que des besoins des parties quant à leur sécurité mutuelle et aux exigences géographiques et économiques;

"... l'examen de cette expérience et des avis formulés par les assesseurs militaires a convaincu les arbitres que, dans les limites des zones soumises à l'arbitrage, la frontière dont la détermination suit est équitable."³⁸³⁾

2) Amiable composition

a) Consideration for the maintenance of peace and security

The Chaco case of 1938 shows, as has just been seen above, an equitable consideration for the sensitive positions of the parties just after the conclusion of a peace, as well as the geographical and economic exigencies which secure for Bolivia access to the River Paraguay and through it to the sea.³⁸⁴⁾

A similar consideration for peace and security was taken in the Rann of Kutch case of 1968. The opinion of the Chairman of the tribunal, to which the arbitrator nominated by Pakistan acceded, awarded the two deep inlets

lying on both sides of Nagar Parkar to Pakistan for considerations of peace. In the words of the Chairman:

"The two deep inlets on either side of Nagar Parkar will constitute the territory of Pakistan. Already in 1885, the Deputy Commissioner of Thar Parkar pointed out that if those inlets were to be considered Kutch territory,

'[a] glance at the map will show that Parkar would be a peninsula almost entirely surrounded by Kutch territory. The State could erect fortifications and establish Custom houses at places situated many miles within the district for instance close to Veerawah, or on some of the roads which, crossing inlets of the Runn, lead from one part of this district to another'. (Pak. Doc. B.9.)

"In my opinion it would be inequitable to recognise these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such."³⁸⁵⁾

Undoubtedly this is a highly political, and hence extra-legal, consideration. But it was characterized as "equitable".³⁸⁶⁾ Perhaps one would do well to remember that the compromis of 30 June 1965 was a cease-fire agreement.

b) In a spirit of chivalry and love for peace between the parties

A somewhat similar consideration for peace, combined with a spirit of chivalry, was shown in the rare case of Aaroo Mountain between Saudi Arabia and Yemen in 1931. The arbitrator, Ibn Saud, one of the heads of State of the parties, decided against his own interests "for the sake of

peace and because of our esteem for the Imam (= King of Yemen) and his acceptance of us as arbitrator". In his telegram to the Imam, the Ibn Saud states:

"... and so I take this step, which I see your Presence worthy of it--and because of love for peace among the Moslem in general and between the two Kingdoms in particular,--and say that we concede the Aaroo Mountain to you hoping that God may guide the Moslems and the Arabs and the two Kingdoms to peace and tranquility. ..."³⁸⁷⁾

As Quincy Wright aptly comments on this arbitration, this is an instance of an Arab leader "manifesting a spirit of chivalry uncommon in international transactions".³⁸⁸⁾

3) Compromise solution

a) Compromise or negotiations between the arbitrators

In the Anglo-American Bay of Passamaquoddy Islands case of 1817, the basis of decision was, as in some other territorial or boundary arbitrations between the same two countries at that or earlier times, simply "according to such evidence as shall be laid before [the two Commissioners appointed by Great Britain and the United States]".³⁸⁹⁾ The tribunal of two commissioners, without a third member, considered whether the islands of the Bay of Passamaquoddy, which is part of the Bay of Fundy, and the island of Grand Menan, in the Bay of Fundy, belonged to the United States or Great Britain.³⁹⁰⁾ They awarded, "in conformity with the true intent of the said second article of said treaty of one thousand seven hundred and eighty-three", Moose, Dudley and Frederick Islands in the Bay of Passamaquoddy to the United States, and all the other islands in that Bay and the Island of Grand Menan in the Bay of Fundy to Great Britain.³⁹¹⁾

Commentators suggest that the award is the result of "negotiations" or "une transaction". As Moore says, "The

British Commissioner undoubtedly exhibited much ability and skill in his negotiations with Mr. Holmes (= United States Commissioner). 'You know,' said Daniel Webster, 'we think that Grand Menan should have been assigned to us.'"³⁹²⁾ De Lapradelle-Politis comments: "... [la décision] n'est, au fond, qu'une transaction. ... les deux commissaires n'ont pas toute l'impartialité désirable."³⁹³⁾ Understandably two arbitrators would be more prone to make a compromise between them than when they are with a third, neutral arbitrator.

When the award was delivered in the British Guiana-Venezuela Boundary case of 1899, the president of the tribunal told the correspondent of Reuter that while the line laid down was "based on justice and law", the arbitrators were "actuated by a desire to establish a compromise in a very complicated question"³⁹⁴⁾ (Emphasis added) He also stressed that the decision had been arrived at unanimously whereas all the awards had been decided by a majority since 1873.³⁹⁵⁾ According to the Venezuelan counsel, however, the unanimity was not a proof of the success of arbitration as the president of the tribunal claimed, and "the line drawn was a line of compromise and not a line of right".³⁹⁶⁾ (Emphasis added)

These statements of the participants in the arbitration, coupled with the lack of reasons for the award, would seem to endorse the impression that the tribunal would have in fact been forced to make a compromise solution in the face of two extreme claims of the parties and in the absence of adequate evidence in support of them. This would not be an isolated case of compromise solution. As W. C. Dennis says, "the methods of the President of the Tribunal in securing a unanimous compromise ... are, in principle, typical of much of the international arbitral procedure of the past."³⁹⁷⁾

b) Compensation for taking a place from one of the parties by awarding another place thereto

In the Honduras-Nicaragua Boundary case of 1906, the

King of Spain, as arbitrator, decides Cape Gracias á Dios as the common boundary on the Atlantic coast "by reason of historical right, of equity and of a geographical nature", and consequently takes the southern arm of the River Segovia at its mouth to the interest of Honduras.³⁹⁸⁾ Then a "compensation" is made in favour of Nicaragua:

"... on the other hand, and as compensation for having taken the mouth of the Segovia in the manner previously mentioned, the bay and town of Cape Gracias á Dios remain within the domain of Nicaragua, which, according to facts beyond dispute and with a great right, would correspond to Honduras."³⁹⁹⁾

In the Anglo-Portuguese Manica Boundary case of 1897, the arbitrator took into account a compensation arrangement between the parties in deciding that one of them was precluded from making objection to it. Acting with some discretion in following the law under the compromis,⁴⁰⁰⁾ he drew attention to the concession which Great Britain had made of granting a large area of territory in the north of the Zambezi to Portugal in compensation for what Portugal would lose in the Manica plateau.⁴⁰¹⁾ In other words a partial acceptance of the arrangement as contended for by Portugal was contrary to both the principles of justice and the rules of Article 2 of the compromis.⁴⁰²⁾ The arbitrator states conclusively:

"Or, il serait contraire aux principes de justice que, sous un prétexte quelconque, le Portugal ... reprit une partie du territoire en échange duquel il a accepté la dite compensation. ... Mais nous devons répéter ... que le Portugal, après avoir accepté par le Traité ce territoire comme une compensation équitable, il n'est plus recevable à opposer des exceptions dont, au surplus, il n'a fourni aucune justification, s'étant borné à de simples allégations."⁴⁰³⁾ (Emphasis added)

Thus the arbitrator confirmed, if not devised himself, the compensatory arrangement of the parties.

An exceptional, though slight, deviation from the strictly legal attitude of the Court of Arbitration would seem to have occurred in the way of a possible compensation for its general decision in the Beagle Channel case of 1977. In the tracing of the boundary line the Court was guided by the considerations indicated in Annex IV, which shows how the line, an adjusted median line, was traced.⁴⁰⁴⁾ As a result it decided that the line should run between Isla Picton and Islas Bécasses, instead of between the latter and Isla Grande. It attributed Islas Bécasses, lying slightly nearer to Isla Grande than to Isla Picton, to Argentina although it could logically have awarded them to Chile on the basis of the main waterway which passed between Islas Bécasses and Isla Grande. Consequently, one may well suspect that, as Malcolm Shaw says, "the Bécasses was awarded to Argentina as a form of compensation for the general decision of the Court".⁴⁰⁵⁾ Unless this decision is based on the principle of proximity, which the Court fails to specify, it may well be characterized as extra-legal, provided the principle of proximity is a legal principle.

c) Consideration to avoid undue advantage being obtained by one of the parties

In the Island of Timor case of 1914 between the Netherlands and Portugal, the arbitrator was directed to decide "sur les données fournies par les Parties" and "en se basant sur les traités et les principes généraux du droit international".⁴⁰⁶⁾ The basis of decision was thus law, but the arbitrator seems to have worked out an equitable balancing between the interests of the parties at least in a portion of the disputed boundary.

Based on the understanding that it is important not to lose sight of equity in the international relations, the arbitrator decides as follows:

"Enfin, si l'on se place au point de vue de l'équité, qu'il importe de ne pas perdre de vue dans les relations internationales, la ligne de faîte suggérée par les Pays-Bas n'est pas contraire à l'équité, en ce sens que le Portugal recevra plus de territoires qu'il n'en devait espérer selon la ligne théorique A C, à laquelle il a consenti en 1904, avant qu'on pût aller reconnaître le terrain. La ligne A C est toute entière tracée à l'intérieur du territoire qui reviendra au Portugal; la République portugaise sera de la sorte partagée, en fait, qu'elle ne pouvait s'y attendre Si, au contraire, le tracé oriental suggéré par le Gouvernement portugais était adopté, les Pays-Bas pourraient avec raison prétendre qu'on les prive de presque tout le territoire qui leur avait été attribué théoriquement en 1904 en contre-partie de l'abandon de l'enclave de Maukatar [= Dutch enclave within the eastern Portuguese territory] au centre de l'île de Timor et en contre-partie de l'abandon des revendications néerlandaises sur l'ensemble de l'<<enclave>> d'Ambeno [= Portuguese enclave within the western Dutch territory]."⁴⁰⁷⁾

The finding could be better understood in the light of the fact that on the whole the Netherlands claims were allowed as a result of the pursuit of consensus of the parties.

In the Beagle Channel case of 1977 the Court of Arbitration showed a rare instance of equitable consideration in connexion with the controversial compromise between the parties concerning Patagonia:

"If, therefore, as the Court thinks, Argentina, by the combined effect of Articles I and II [= Articles I and II of the 1881 Boundary Treaty], obtained the whole of Patagonia north of the Dungeness-Andes line and east of the Cordillera of the Andes, it does not seem unreasonable to regard Chile as receiving in principle under Article II the much smaller area between that line and Cape Horn, subject always to the

effect of the 'without prejudice' clause and the provisions of Article III."⁴⁰⁸) (Emphasis in original)

- d) Artificial line devised to reconcile the claims of the parties which both conform to the treaty

The Honduras-Nicaragua Mixed Commission, set up by the "Basis of Arrangement" drafted by the Inter-American Peace Committee and accepted by the Governments of Honduras and Nicaragua with a view to implementing the judgment of the International Court of Justice of 18 November 1960 concerning the Arbitral Award of 1906, was "Under the terms of the Arbitral Award of December 23, 1906, to fix on the ground the boundary line from the juncture of the Bodega or Poteca River with the Guineo River as far as Portillo de Teotecacinte".⁴⁰⁹) As there was agreement between the two national commissioners on the boundary line up to the Rincón de Murupuxí (point A),⁴¹⁰) the Mixed Commission had to decide the section of the line beyond that point. The lines proposed by the two States, however, were found by the Commission to be "in agreement with the terms of the Award".⁴¹¹)

Thereupon the Chairman of the Mixed Commission, based on his powers to make the final decision in the event of disagreement between the Honduran and Nicaraguan commissioners under the Basis of Arrangement, paragraph 6,⁴¹²) devised an artificial straight line from the Rincón de Murupuxí to the Limón (or Poteca) River:

"Consequently, the western boundary of the Sitio de Teotecacinte, which is, in the understanding of the undersigned, a straight line from the corner marker of Murupuxí, south 8 degrees, 31 minutes, 30 seconds west, according to the triangulation of the Commission of Engineers, should be followed. After approximately 600 meters, this boundary crosses the Limón River, one of whose headwaters rises in the Portillo de Teotecacinte. ...

"If the whole of the frontier traced by the Award

were examined in the light of the argumentation of the Representative of Honduras relative to the deviation which this demarcation undergoes in the south-east corner of the Sitio de Teotecacinte, the eastern and northern boundaries of the Sitio, together with the 600 meters south from Murupuxí, would clearly appear as the only break in continuity in a perfect natural boundary."⁴¹³⁾

Although the function of the Mixed Commission was "to fix on the ground the boundary line" rather than that of an arbitral tribunal, its determination of a straight line, if only for a short distance, on the basis of what would seem to be the Chairman's equitable considerations under the circumstances, is a delimitation, and not a mere demarcation of a technical nature.

3. A Summary Review of the Cases Analyzed

(1) Equitable considerations in procedural matters

Equitable considerations in procedural matters, although not directly linked to those on the merits of the case, are not irrelevant to equitable considerations in respect of the substantive matter. The tribunal's liberty of accepting and collecting evidence, as seen in the Island of Palmas and Rann of Kutch cases, the acceptance of additional documents during the preliminary phase in the Argentine-Chile Palena case, and the examination of pleas of estoppel and the critical date in the same case all turned out the respective tribunal's willingness to take into account as much evidence and as many relevant circumstances as possible in forming its judgment on the merits of the case. In the Lake Lanoux case the tribunal's somewhat conciliatory method of interpretation was the forerunner of its equitable balancing of the legal positions of the parties.

To look at the matter from a different angle, it would be illogical for the tribunal to give a consideration to

procedural questions and quite another kind of consideration to substantive points in one and the same case. It is only natural that the tribunal should be consistent in its whole process of reasoning, and consequently it is small wonder if an equitable consideration in a question of procedure should lead to another such consideration on the merits of the case.

(2) Equitable considerations in substantive matters

1) The analysis made in the previous section shows that many of the older compromis have an equitable basis of decision in a variety of expressions. Under those terms of reference the tribunal was enabled to take a broader view of the point or points at issue than a strict application of the law would have allowed it to do, or to proceed to decide the case simply by reference to equity.

Some recent compromis for ad hoc arbitrations refer only to law as the basis of decision, as do, naturally, the special agreements to submit a case to the Permanent Court of International Justice or the International Court of Justice. Yet, as has been seen above, some equitable considerations have been given in such arbitrations and the cases of judicial settlement. In some cases before the Court at The Hague, however, it would seem to have been thought necessary to say that the Court was applying equity as part of law and that it was not acting ex aequo et bono.⁴¹⁴⁾ The same thing is true of some recent arbitrations which were expressly based on law.

One notable feature of some recent cases before the International Court of Justice is that express reference is made to "equitable principles" in the compromis or the submissions of the parties.⁴¹⁵⁾ As the Court is a court of law which is to decide "in accordance with international law",⁴¹⁶⁾ such reference to "equitable principles" ought to be within the domain of law.

2) Even where the basis of decision was law or was not clearly provided, the tribunal appears to have had frequent recourse to equity or equitable considerations by

taking account of the special or relevant circumstances of the case. Perhaps it would be well to recall that the lack of definition of the basis of decision can be a prima facie evidence of the tribunal being allowed to have recourse to equitable considerations since it is not requested to decide on the basis of law.⁴¹⁷⁾

3) To review what role equity has played in the arbitration and judicial settlement of territorial and boundary disputes, here are some salient features of the cases analyzed in the preceding Section.

(i) Weighing of the claims and evidence of the parties is properly a part of the process of legal reasoning. But the very careful manner in which the tribunal weighs them, as it did in the Island of Palmas case, the Eastern Greenland case and the Rann of Kutch case, is not merely a process of legal consideration but amounts to thoughtfulness for the parties, an equitable consideration to give satisfaction to the losing party that it was duly heard, as well as the winning party.

(ii) In many of the cases the "relevant (special or particular) circumstances" were taken into account. The way in which they were taken into account may be divided into two broad categories: one in which they were taken into account for the interpretation of the relevant treaty or other legal instruments or acts and the other in which they were taken account of as part of the decision of the case.

The first category includes the North Atlantic Coast Fisheries, Aegean Sea Continental Shelf (Jurisdiction), Anglo-French Continental Shelf, Frontier Land and the Temple of Preah Vihear cases. It is as interesting as instructive to note that equity was defined by the arbitrator of the Georges Pinson case of 1928 as the liberty to appreciate the evidence according to the concomitant circumstances.⁴¹⁸⁾ It implies a typical example of equity infra legem.

Secondly, the "relevant circumstances" were taken into account in the decision of the merits in the maritime boundary delimitation cases of the Grisbadarna, North Sea

Continental Shelf, Anglo-French Continental Shelf, Beagle Channel, Tunisia-Libya Continental Shelf, Gulf of Maine, Guinea-Guinea Bissau Maritime Boundary Delimitation, and Libya-Malta Continental Shelf. They also played an important role in the Behring Sea Fur Seal Arbitration, Fisheries and Western Sahara cases. In some cases they played a crucial role and in the others a less important role, but on the whole they were instrumental in an equitable settlement of the dispute concerned.

If the equitable considerations in those cases were broadly infra legem, the taking account of the relevant circumstances in the Chaco case would seem to have been part of the decision ex aequo et bono, for in this case the arbitrators were expected to proceed ex aequo et bono to render an award in equity.

(iii) Whether for the interpretation of the relevant treaty, other legal instruments or acts, or for the decision of the merits of the case, the consideration of the "relevant circumstances" has been intended, it seems, to arrive at an equitable solution of the dispute. Some cases, mostly the recent ones, expressly state--even repeat--the objective of an equitable settlement of the dispute. Indeed the judgment of the International Court of Justice in the North Sea Continental Shelf cases, the watershed in the contemporary law of maritime boundary delimitation, emphasizes the importance of a "reasonable result" irrespective of the method of delimitation.⁴¹⁹⁾ The arbitral award of the Anglo-French Continental Shelf case followed suit, and the Tunisia-Libya Continental Shelf case is most emphatic about the overriding importance of an equitable result. The Court says that the "equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result".⁴²⁰⁾

On the other hand, in the final draft article on the delimitation of the continental shelf in the Draft Convention on the Law of the Sea of 1981, the phrase "in order to achieve an equitable solution" appeared for the first time to indicate the purpose of continental shelf

boundary delimitation.⁴²¹⁾ The text of the draft article is quoted in the judgment of the Tunisia-Libya Continental Shelf case,⁴²²⁾ which endorses the influence of that phrase on the judgment of the Court. Thus the predominant importance of an equitable result in the delimitation of continental shelf boundaries seems to have crystallized as a customary rule of international law; the final draft article's wording has remained unchanged in the Convention on the Law of the Sea of 1982.

(iv) One further point of importance is the balancing of relevant interests. The judgment of the North Sea Continental Shelf cases points out that "more often than not it is the balancing-up of all such considerations that will produce this result [= equitable result] rather than reliance on one to the exclusion of all others".⁴²³⁾ Thus the various interests involved of the parties were balanced up in one way or another in the North Sea Continental Shelf, Fisheries Jurisdiction, Anglo-French Continental Shelf, Tunisia-Libya Continental Shelf, Behring Sea Fur Seal, Diversion of Water from the Meuse, Lake Lanoux and North Atlantic Coast Fisheries cases. Perhaps of particular interest is the separate opinion of Judge ad hoc Jiménez de Aréchaga in the Tunisia-Libya Continental Shelf case in which he states: "All the relevant circumstances are to be considered and balanced; they are to be thrown together into the crucible and their interaction will yield the correct equitable solution of each individual case."⁴²⁴⁾

(v) In some cases recourse was had to equity in the absence of law or despite ostensible application of law. This kind of equity could be defined as equity praeter legem, rather than infra legem. Here again it may be suspected that the overriding concern of the tribunal was to achieve an equitable solution for the satisfaction of the parties.

(vi) Still another notable feature is the tribunal's consideration for peace and security in a couple of cases and a solution of compromise in some of the older boundary arbitrations. Consideration for peace and security may be

better understood in the broader context of the case concerned in which the arbitration was worked out as part of the peace treaty between the parties. With respect to the compromise solution by the tribunal of the dispute, one might be reminded of the comments of William Cullen Dennis in his article, "Compromise - the Great Defect of Arbitration" (Columbia Law Review, vol.11, 1911), and elsewhere. In the old case of Bay of Passamaquoddy Islands of 1817 between Great Britain and the United States, where there was no neutral third State arbitrator, a compromise or negotiation between the arbitrators may well have been unavoidable for a solution of the dispute. Even if this is an exceptional case of compromise of a diplomatic nature, which is "the great defect of arbitration" in the words of Dennis, it would not be entirely wrong to say that the borderline between a compromise solution and an "equitable solution" as a result of balancing all the relevant considerations may be a very fine one.

Chapter IV

Theoretical Review of Applications of Equity

The discussion of considerations of equity in the previous Chapter has now raised a number of points of theoretical interest. They deserve discussion in more detail from theoretical points of view, which will hopefully help to make the rôle of equity in its relation to law clear. Such points, among others, are: (1) the growing reference to "equitable principles"; (2) the important function of "relevant circumstances" in the settlement of disputes; (3) the predominant importance of an "equitable solution" of the dispute and elements of compromise therein; (4) the criticism on equity; (5) the need for careful weighing of "relevant circumstances"; and (6) the relevance of historical and cultural circumstances.

1. The Growing Reference to "Equitable Principles"

The International Court of Justice in its judgement in the North Sea Continental Shelf cases quoted the relevant portion of the Truman Proclamation of 1945 on the delimitation of continental shelf boundaries,¹⁾ and formed its guidelines for negotiations between the parties in which it states: "delimitation is to be effected by agreement in accordance with equitable principles".²⁾ This has, as has already been seen, been followed by the earlier draft articles on the delimitation of continental shelf boundaries in the Third United Nations Conference on the Law of the Sea³⁾ and the subsequent arbitral and judicial decisions on the same subject.⁴⁾

What is the status of "equitable principles" in international law then? The International Court characterizes them as a part of law, for it says that "it is precisely a rule of law that calls for the application of equitable principles."⁵⁾ This view seems to have been adopted by the subsequent arbitral tribunals and the parties before them and the International Court as well as

the International Court itself. In the opinion of Judge Shigeru Oda, "equitable principles" are "undoubtedly taken in the Anglo-American law as synonymous with 'principles of equity'".⁶⁾ If his presentation of equity as a part of "general principles of law" in his capacity as counsel for the Federal Republic of Germany before the International Court in 1968⁷⁾ has remained unaffected, "principles of equity" are a part of law.

In the Tunisia-Libya Continental Shelf case of 1982 equity and equitable principles are discussed in some detail. Pointing out the dual use of "equitable principles", the International Court of Justice stresses the predominant importance of the result of their application:

"This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result. It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution."⁸⁾

It is true that the importance of an equitable result was mentioned in the North Sea Continental Shelf cases⁹⁾ and the Anglo-French Continental Shelf case,¹⁰⁾ but this is the first time ever that the primordial importance has been attached to an equitable result in such unequivocal terms. Unfortunately, however, this raises the question of how the application of equitable principles is to be distinguished from a decision ex aequo et bono, which likewise aims at an equitable solution of the dispute. The Court states elsewhere in the same judgment: "Application of equitable principles is to be distinguished from a decision ex aequo

et bono." ¹¹⁾ But it fails to show categorically that the two methods of decision belong to two fundamentally different domains. What is the use of such distinction, it may be asked, when they have the same object of arriving at an equitable result? Unless there is a satisfactory explanation furnished for the reason and criterion for such distinction, except that one requires prior agreement of the parties for its application whereas the other does not, the implication may well be that by allegedly applying equitable principles, the Court could virtually decide ex aequo et bono.

In this connexion it may be noted that in the Gulf of Maine case the Chamber of the International Court of Justice avoided the use of "equitable principles" and preferred to use "equitable criteria" "for reasons of clarity". ¹²⁾ (Emphasis added) It offers no more reasons. While the term "criteria" can certainly make easier identification of criteria for the tribunal's decision than the term "principles" which needs further specification for application, it may be suspected that it absolves the tribunal from the obligation to apply principles of law. Whether the Chamber's substitution of "criteria" for "principles" was the right course of action, the full Court reverted to the use of "equitable principles" in the Libya-Malta Continental Shelf case. ¹³⁾

This nevertheless does not answer the recurrent question of what is the specific content of equitable principles. All that can be said is that they can be specified by virtue of consideration of the relevant circumstances in a given case.

2. The Important Function of "Relevant Circumstances" in the Settlement of Disputes

The importance of taking account of the "relevant circumstances" or "special circumstances" in a given case seems now firmly established. All the recent judicial and arbitral decisions on the delimitation of maritime boundaries have taken this factor into account in one way

or another, while the modern precursor may be the Grisbadarna case of 1909.¹⁴⁾ This is supported by not a few instances of State practice. For example, the conclusion of the Australia-Papua New Guinea Treaty on Sovereignty and Maritime Boundaries of 18 December 1978¹⁵⁾ was made possible by a comprehensive consideration of all the relevant circumstances. As a member of the Australian team for negotiating the treaty writes, "Although the Treaty is primarily a delimitation agreement, it was only possible to arrive at a solution on maritime boundaries by tackling all the other related issues." He suggests that "only in this way can complex delimitation issues be resolved".¹⁶⁾

Although not related to territorial or boundary delimitation issues but to equitable uses of waters of international rivers, the Helsinki Rules of 1966 adopted by the International Law Association have some pertinent provisions. Article V, paragraph (1), runs:

"What is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case."¹⁷⁾

This is followed by a list of relevant factors to be considered, numbering eleven but not limited to these, in paragraph (2).¹⁸⁾ This formula is a good evidence that the determination of a reasonable and equitable share must be made in the light of all the relevant factors. This can also be true of any other kind of determination.

Writers too are broadly in favour of the consideration of relevant factors. Cukwurah stresses its importance in the process of delimitation:

"It is essential for an effective boundary delimitation that diplomats and their advisers, or in the case of arbitral or judicial delimitation, that the tribunal should possess all the relevant facts, obtained through prior reconnaissance and inquiries,

concerning the topographical conformation of the area to be delimited, and also the political, social, economic and ethnic interests which may be affected by it."¹⁹⁾

In a comment on the Tunisia-Libya Continental Shelf case, Yadh Ben Achour makes a similar remark by saying: "Tout fait quelconque, qu'il soit géographique, historique, diplomatique, économique ou autre, susceptible, par sa nature, ou son poids dans l'ensemble du contexte, d'avoir une influence sur l'opération de délimitation, constitue une circonstance pertinente."²⁰⁾ Similarly, but in more general terms, Wortley refers to the judge's duty to attempt to evaluate an alleged legal rule or custom "in the light of all the knowledge and the facts which seem to him to be relevant", for he says that parties to a dispute may usually be counted upon to bring to the judge's notice facts that might affect the judge's decision.²¹⁾

What rôle does the consideration of relevant circumstances play in more specific terms then? When the basis of arbitral or judicial decision is law, it will in principle be a rôle infra legem; when the basis of decision is equity or unspecified in the compromis, it could play a rôle praeter legem, a corrective rôle or even one contra legem. This process of consideration of relevant factors may now be briefly reviewed to see its function in the settlement of the dispute concerned.

Here may be hazarded a distinction between a case of determination of territorial sovereignty and a case of boundary delimitation, although it is admitted that the test of effective control counts not only in the former case but, if partly, in the latter. Charles de Visscher agrees to such a distinction:

"On s'accorde pour admettre une distinction fondamentale entre les questions que pose directement le titre à l'attribution en souveraineté d'une surface ou masse territoriale donnée et celles que soulève la délimitation des surfaces lorsque, dans les régions de

confins, le problème se ramène au tracé d'une frontière. C'est en ce sens que l'on parle de conflits territoriaux d'attribution et de conflits territoriaux de délimitation."²²⁾

The justification for the distinction would be that in a case of the first type the issue is the attribution of the disputed territory to one or the other party, whereas in a case of the second type the principal issue is to delimit the boundary line which can, if it is deemed as necessary, divide the disputed area.²³⁾ These two types of cases are conveniently represented here by the Island of Palmas on the one hand and the British Guiana-Venezuela Boundary and Palena cases on the other.

In the Island of Palmas case the sole arbitrator finds that neither party's claimed title is sufficient to establish its sovereignty over the Island, and consequently that "the decision of the Arbitrator would have to be founded on the relative strength of the titles invoked by each Party".²⁴⁾ For the compromis in its Article I lays down, in part:

"The sole duty of the Arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory."²⁵⁾

The Arbitrator further states with emphasis that "since, according to the terms of its Preamble, the Agreement of January 23rd, 1925, has for object to 'terminate' the dispute, it is the evident will of the Parties that the arbitral award shall not conclude by a 'non liquet', but shall in any event decide that the island forms a part of the territory of one or the other of two litigant Powers".²⁶⁾ In other words, the Arbitrator was driven into a difficult situation where he had no other choice but to decide to attribute the Island to one or the other of the parties. It would be due partly to this situation that the

arbitrator's reasoning led to the mentioned very careful weighing of the claims of the parties. The basis of decision was "the principles of International Law and any applicable treaty provision",²⁷⁾ which the arbitrator applied as did the parties. But the very process of extremely careful weighing of the claims and evidences preferred by the parties could rightly be called a function of equity to assist or complement the application of law.

On the other hand, the geographical and economic circumstances were not taken into account in this arbitration, as they are normally taken into account in the other cases, while only such acts of the States as display State authority and create its legal titles to sovereignty were taken into account. In other words, strictly legal considerations were bestowed on the claims and evidences of the parties, and it is of the careful weighing of those from the legal points of view that equity or equitable considerations may be mentioned.

In a boundary delimitation case, too, count is set on the peaceful and continuous display of State sovereignty claims to which are as carefully weighed as in a case of territorial attribution. Some of the boundary cases, however, have taken account of acts of a private nature as well as of a public nature. Generally, in boundary disputes each party tends to claim the boundary line to lie in what the other party claims to be its own territory or area of jurisdiction, and the tribunal is compelled to weigh the respective claims and evidences.²⁸⁾ This would appear to be the reason why the tribunal comes to a seemingly compromise solution unless the claims of one party are proved unequivocally to prevail over those of the other party.²⁹⁾ This is the more so if a declaration of non liquet is generally not allowed to be made.³⁰⁾

Thus in the British Guiana-Venezuela Boundary case both Great Britain and Venezuela made extensive reference to their official acts as well as those of their predecessor States, the Netherlands and Spain, making efforts to prove their superior political control over the disputed territory.³¹⁾ In addition they relied on their

people's acts and activities of a private nature as a complementary means in support of their claims. They invoked, for example, the settlement of missionaries,³²⁾ farming, fishing and trade³³⁾ in their claimed territories. But in the eyes of the tribunal many of the massive evidences were not effective enough to establish the claims of the parties. Under these circumstances the tribunal would seem to have been obliged to decide a boundary line which was later to be suspected by one of the parties of a "compromise" line.³⁴⁾

In the Palena Boundary case of 1966 between Argentina and Chile, the Court of Arbitration officially refrained from taking account of the private activities claimed by the parties. But the suspicion or surmise, as pointed out by one commentator,³⁵⁾ could hardly be wiped out that private activities may have been in the mind of the arbitrators in deciding the crucial part of the boundary line. The point at issue is the consideration of "land use, settlement and circulation of local trade". According to Argentina, "much of the Chilean material amounts to no more than this: that persons possessing Chilean nationality are or have been living in the disputed area. This is not evidence of 'occupation' or 'control' of territory, whether in legal principle or as a matter of political reality."³⁶⁾ This was rejected by the Court of Arbitration. The Court states: "[T]he Court has not taken the view that 'the fulfilment material' [= the material concerning the implementation of the 1902 award] submitted by either side ought to be excluded as completely irrelevant. This is because, in the Court's opinion, such evidence is relevant to the question of settlement--whether for instance what was settled in 1902-03 has since become unsettled or has become settled in a different way, and whether too 'the fulfilment material' throws any light on the question whether what was left unsettled in 1902-03 has since become settled."³⁷⁾ As a result of an examination of such material, however, the Court concludes: "But, taken as a whole, the evidence is just what one would expect in any disputed zone. It shows settlers not surprisingly turning

to the authorities of both countries in case of need and doing their best to keep on good terms with both sides. The evidence is quite insufficient to establish any abandonment by Argentina of her rights under the 1902 Award or any acquisition of title by Chile through adverse possession of territory adjacent to those parts of the boundary line settled in 1902-03. No more, in the Court's view, does the evidence establish that the parts of the line remaining unsettled in 1903 have subsequently become settled in the sense now contended for by Chile."³⁸⁾

Nevertheless, by identifying the Eastern Channel as the major channel of the River Encuentro--which choice, incidentally, coincides with the Chilean claim--,³⁹⁾ the Court did delimit a boundary line which in effect attributed to Chile the California Valley where many Chilean nationals had settled. Thus one may be left with the suspicion that the Court of Arbitration, while proceeding to interpret the 1902 award in good faith on the legal basis of decision as provided for in the compromis, did in fact rest its decision on such consideration of the "relevant (or special) circumstances" of the case.⁴⁰⁾ If this consideration is one of equity, it would not be an aspect of equity inherent in the application of law but might well be a substitution for law with a view to avoiding an inequity which could have resulted from the application of law.

It is a truism to say that geographical, political, socio-economic, historical and cultural factors have their varying rôles to play according to the particular circumstances of a given case. But what is of crucial importance is the "balancing-up of all such considerations ... rather than reliance on one to the exclusion of all others", to employ the words of the International Court of Justice in its judgment in the North Sea Continental Shelf cases.⁴¹⁾ The same idea is embodied in the International Law Association's Helsinki Rules on Uses of Waters of International Rivers, Article V, paragraph (3):

"The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole."⁴²⁾

All this is undoubtedly intended for an equitable solution of a problem. But it is well to remember the caveat that emphasis on the equitableness of a solution could induce a compromise solution.

3. The Predominant Importance of an "Equitable Solution" of the Dispute and Elements of Compromise Therein

As has already been seen, the International Court of Justice, in its judgment in the Tunisia-Libya Continental Shelf case, made an unequivocal statement that an equitable result is predominant, equitable principles being subordinate to this goal.⁴³⁾ This is only natural, it is submitted, in so far as an arbitral or judicial decision is to settle or solve a dispute. From this point of view, the statement is reasonable that "The aim of delimitation has always been to find a mutually acceptable boundary, based on principles and rules that would provide an equitable result."⁴⁴⁾ Indeed the element of mutual acceptableness to the parties can be said to be contained in an equitable solution.⁴⁵⁾ This leads to a discussion of compromise.

Most writers who discuss sharing resources or environmental issues seem to agree on the necessity of a proper balance among competing interests or values. For example, Günther Handl, after listing some concepts such as "international solidarity", "ecological good neighbourliness" in his discussion of shared natural resources, has this to say:

"The gist of these notions is simply that states share an equitable interest in the utilization of a common natural resource; that accordingly states are

under an obligation to attempt to reconcile their interests with those of other potentially affected states; and that any claim to the rightful use of a shared natural resource has, therefore, to be judged in, in particular, the overall social, environmental and economic context in which the right is being asserted."⁴⁶⁾

This is another way of saying, as Oscar Schachter does, that "the concrete problem is often one of achieving a proper balance or trade-off among competing values". This author rightly points out that the "idea of trade-offs is especially prominent when issues of equity are in the forefront".⁴⁷⁾

From yet another point of view, Cukwurah defends a compromise solution of a boundary dispute, stating that "The Chamizal award illustrates another instance of boundary dispute in which only a compromise settlement would have been near to the truth. It does not seem unthinkable, particularly in a dispute of such a complex nature, that one who has power to find title wholly in one party or the other has also the power, unless this is expressly excluded, to find it partly in one and partly in the other."⁴⁸⁾

Perhaps a strong case for a compromise solution may be found in a statement on this subject by an experienced lawyer-diplomat, William Cullen Dennis. Once writing a critical article on compromise, "Compromise - the Great Defect of Arbitration",⁴⁹⁾ in 1911, he subsequently turned out somewhat sympathetic towards it. In a comment he made in 1950 on the British Guiana-Venezuela Boundary case, he conceded that compromise is involved in adjudication. He said: "We cannot claim even yet to have reached the stage where the element of compromise is eliminated as completely from international, as it has been from national, judicial proceedings (and it has not and probably never will be completely eliminated from any human procedure)"⁵⁰⁾

4. The Criticism on Equity

Consideration of "relevant circumstances" plays varying rôles in individual cases. How it is concerned with law, when law is the basis of decision, can only be determined in the light of the particular circumstances of each individual case. Such would be the nature of equity. On the other hand, it must be logically admitted that as its criteria are not necessarily clear, equity is susceptible to arbitrary application. In this sense an argument has recently been advanced that equity, being of such a nature, should be avoided and that "general principles of law" might as well be applied instead.⁵¹⁾ This deserves serious discussion. But it seems to be based on the assumption that equity and "general principles of law" belong to different branches of norm.

In the North Sea Continental Shelf cases, however, it was argued that equity forms a part of "general principles of law". Consequently, it is necessary first to see whether the former constitutes a part of the latter, and then whether, as has been argued, the latter must be used rather than the former.

(1) Whether equity is a part of "general principles of law"

In its pleadings in the North Sea Continental Shelf cases Federal Republic of Germany asserted that the alleged principle of "just and equitable share" should be applied in the delimitation of continental shelf boundaries, and that it was a substantive principle forming a part of "general principles of law".⁵²⁾ The Court did not accept the German thesis in toto, but in effect admitted that equity is a part of "general principles of law".⁵³⁾ The logic, as propounded by the Federal Republic, is that equity as distinguished from ex aequo et bono is an instance of "general principles of law".⁵⁴⁾ The distinction between ex aequo et bono and "general principles of law" is easy to see in the light of how they

were embodied in Article 38 of the Statute of the Permanent Court of International Justice, the first in paragraph 2 and the second in paragraph 1.⁵⁵⁾

But as to whether equity is included in "general principles of law", adequate studies of comparative lawyers will be required, as Schwarzenberger suggests,⁵⁶⁾ to prove that equity, along with other moral values, is recognized in the world's major legal systems as part of "general principles of law". That is far beyond the scope of the present study.⁵⁷⁾

A strong case against the inclusion of equity in "general principles of law" is presented by Charles de Visscher. He maintains that in its simply interpretative rôle equity is inherent in the sound application of rules of law, whereas in its complementary rôle it is an independent source of law, distinct from not only treaties and customary law but "general principles of law".⁵⁸⁾ His opposition to its inclusion in "general principles of law" is clearly seen in this statement:

"Quelques auteurs ont cherché à ramener l'équité aux "principes généraux de droit reconnus par les nations civilisées". Il n'y a pas lieu de s'arrêter à cette suggestion. Quelque idée que l'on se fasse des principes généraux de droit tels qu'ils figurent à l'article 38 du Statut, il est certain qu'ils y revêtent, tout comme le traité et la coutume, un caractère de généralité ou de positivité, alors que l'équité se caractérise essentiellement comme une expression individualisée de la justice."⁵⁹⁾

As has been seen above in Chapter III, the consideration of "relevant circumstances" or "special circumstances peculiar to the case" has not only the interpretative rôle but the rôle to complement or supplement the law and even correct the inequity which the strict application of the law would entail. This latter function of equity or equitable considerations could not be included in that of "general principles of law".⁶⁰⁾

(2) Whether "general principles of law" should be applied instead of equity

Writers have pointed out a number of defects of equity. Sir Francis Vallat, for example, in discussing draft Article 25 on the dissolution of a State in the draft Articles on succession of States in respect of matters other than treaties at a meeting of the International Law Commission, referred to equity as a "very mobile quantity", because in his opinion "a political factor, in the loose sense, for one State might be regarded as a matter of equity by another".⁶¹⁾ Such elasticity gives the tribunal considerable latitude in its application, and it is on this point that many writers make critical comments.

In the earlier days of English law Sir Francis Bacon advocated a rigid separation between courts of law and court of equity, while Lord Kames believed that the separation of law from equity was a chimerical idea and that justice demanded a mixed jurisdiction for each court. Beneath their differences, however, there was a crucial underlying agreement that equity, though necessary to correct the harshness of strict law, could degenerate into arbitrary judicial discretion.⁶²⁾ Aristotle is known to have entertained fear of judicial discretion.⁶³⁾ Modern writers, no less critical of judicial discretion, point out that international judges have wider discretion than national judges,⁶⁴⁾ and that international judges have a greater risk of error in the ex aequo et bono procedure than in the ordinary procedure.⁶⁵⁾

Michael Akehurst lists "dangers of applying equity": the concept of equity could be used to give an "aura of respectability" to exceptions to rules of law; ideas of equity often vary according to the interests and culture of the State concerned; equity is subjective; criteria of equity are obscured in the international society where political, ethical and cultural values are far more heterogeneous than in a national society; international lawyers from communist countries are opposed to the application of equity on the grounds that it is subjective;

some arbitrators upheld, on the grounds of equity, that a State should be made liable for the acts of unsuccessful rebels, while others rejected the idea as inequitable; in a legal system where there is no compulsory judicial settlement, States base claims on considerations which seem equitable to them but not to their opponents; a judgment which seems equitable to the winning party may not seem equitable to the losing party, who will be tempted to refuse to execute the judgment.⁶⁶⁾ In view of these "dangers" the author suggests that more use may as well be made of "general principles of law", which he submits provide a more reliable criterion for determining the content of equity.⁶⁷⁾

All he says in terms of "dangers of applying equity" has to be admitted to be true. But one must note the author's disclaimer that he treats only those cases in which the basis of decision was law but equity was applied.⁶⁸⁾ In the cases where the tribunal was authorized by the compromis to apply equity, which are excluded from his study, it may be surmised that the parties concluded such a compromis on the understanding that they would be ready to accept a decision which could have such "dangers". Since international adjudication still remains a procedure based on the agreement of the parties on its institution, the fact must be admitted that some States do indeed rely on the "dangerous" application of equity in their chosen third-party adjudication.

In the same line of thought as Akehurst's is Sir Gerald Fitzmaurice when he suggests the need to study equity, as distinguished from ex aequo et bono, in the context of "general principles of law".⁶⁹⁾ The suggestion is made on the understanding that the maintenance of a reasonable predictability as to the basis of decision could help to ensure increased resort to the International Court of Justice.⁷⁰⁾ He seems to stress, as does Akehurst, "general principles of law" as a more objective basis of decision. But the trouble is that it is not always clear whether a principle or standard belongs in the realm of equity or "general principles of law". Nor is it always

clear to the tribunal whether there is a "general principle of law" common to the parties unless one or the other party cites it. Consequently, while one can understand or even sympathize with the suggestion of Fitzmaurice and Akehurst in favour of "general principles of law", one cannot underestimate the fact that there are some States which prefer to rely on equity for its elasticity despite the caveat that it has a number of "dangers" in its application.

5. The Need for Careful Weighing of "Relevant Circumstances"

It has already been noted that reference to "relevant circumstances" is an inevitable trend, whether it is expressly laid down in the compromis or not. But, as it has also been noted, there is a danger that the way in which they are taken into account can be arbitrary. The problem now is, therefore, to find out how the claimed relevant circumstances are to be weighed in a rational and systematic way.

According to a commentator, mediaeval English judges quite confidently referred to equity without providing reasons in arriving at their decisions, whereas 20th-century judges, living in an age of self-consciousness, are concerned about what objective foundation their decisions have or how they can be sure that their decisions are not subjective. Such questions, he says, have a debilitating effect on concepts such as justice and equity.⁷¹⁾ If this is so, it is submitted that it is a welcome tendency, for it shows that judges are aware of ambiguities and dangers of equity, being careful in its application.

It must be admitted in the first instance that application of equity can be arbitrary. Its application by the tribunal appears "comme une justice plus ou moins individualisée". In other words, equity "se conçoit par rapport à la règle dont elle invite à se départir dans la mesure où l'exige une justice adaptée à l'espèce".⁷²⁾ This process of adapting equity to the particular circumstances

of the case involves the consideration of relevant circumstances. Such consideration, as well as the antecedent evaluation of the particularities of the case, is taken at the discretion of the tribunal.

Secondly it may be pointed out that in the recent cases of maritime boundary delimitation, especially since the North Sea Continental Shelf cases of 1969 mentioned the taking account of "all the relevant circumstances",⁷³⁾ the parties have presented for consideration by the tribunal as many "relevant circumstances" as they can think of.⁷⁴⁾ In the face of the massive evidence in support of their claims, the tribunal, being constituted on the basis of the consent of the parties, has responded to it either by taking a part of it into account for the decision or by using it, or a part of it, for the verification of equitableness of the solution adopted by other criteria. Some dissenting opinions point out a change--a departure from the past jurisprudence--in the reasoning of the International Court of Justice on equity in the Tunisia-Libya Continental Shelf case of 1982. Judge André Gros, in his dissenting opinion attached to the Chamber's judgment in the Gulf of Maine case of 1984, states:

"L'arrêt de 1969 et la sentence de 1977 avaient construit des barrières à l'emploi de la notion de l'équité; l'arrêt de février 1982 et le présent arrêt les ont supprimées."⁷⁵⁾

Such criticism would seem to suggest the need for adequate weighing of the various considerations presented by the parties to the tribunal. To quote Judge Gros again, "dans l'état actuel du droit international, selon la jurisprudence de la Cour dans l'arrêt de 1982 fondé sur le texte conventionnel de 1982, tout peut désormais être jugé pertinent pour arriver à une résultat équitable si les Etats intéressés sont d'accord pour le soutenir ou si le juge en est convaincu."⁷⁶⁾ Sharing this critical view of Judge Gros, Jonathan I. Charney proposes a set of rules for the process of balancing "relevant factors" in the

delimitation of maritime boundaries.⁷⁷⁾ The attempt is intended as an aid for evolving a substantive rule of law for all cases.⁷⁸⁾ Composed of five separate but consequential steps, its gist merits mention here:

"(1) The functions served by coastal state jurisdiction in the specific ocean zone to be delimited should be identified.

(2) All the facts concerning the instant boundary area that reflect the functions to be served by the zone should be identified.

(3) To the extent possible, each piece of information identified in the prior paragraph should be used to construct a line or range of lines that best suits the function to which it relates.

(4) These alternative lines and previously identified factors should be studied and weighed according to their importance. In a process that might even approach vector analysis, a line that best reflects all the relevant factors in light of their importance to the zone should be sought.

(5) A cartographical method should be selected to describe the line accurately and reliably."⁷⁹⁾

An inductive approach to the analysis of the recent cases of maritime boundary delimitation--the North Sea Continental Shelf, Tunisia-Libya Continental Shelf and Libya-Malta Continental Shelf cases giving guidelines for negotiations between the parties and the Anglo-French Continental Shelf, Gulf of Maine and Guinea-Guinea Bissau Maritime Boundary cases delimiting the boundary line--could work out a set of rules and principles, together with a complementary set of "relevant circumstances" to be taken into account. A further elaboration of these rules and principles might well contribute to the formulation of general rules for the weighing up of "relevant circumstances".

6. The Relevance of Historical and Cultural Circumstances

There is a question which can conveniently be included in "relevant circumstances" but in fact is of a more fundamental nature: that is the historical and cultural aspects of equity. These can be discussed, as they have been discussed above in Chapter III, as part of "relevant circumstances", to be sure, but it is submitted that they could have more basic implications than a mere functional role.

With respect to the historical perspective in which to view equitable considerations, some lawyers argue that equitable considerations must be given to a point at issue in a given case in the context of decolonization. The argument seems to centre upon the alleged 'excess profits' of the colonial Powers during their colonial rule.⁸⁰⁾ When the General Assembly of the United Nations adopted a resolution on 14 December 1962 on "Permanent Sovereignty over Natural Resources", the first of its kind, it laid down that "appropriate compensation" must be made for "nationalization, expropriation or requisitioning".⁸¹⁾ But in its third resolution on the same subject adopted on 17 December 1973, the General Assembly replaced the phrase "appropriate compensation" with "possible compensation".⁸²⁾ (Emphasis added) This, however, was changed back to "appropriate compensation" in the Charter of Economic Rights and Duties of States, another General Assembly resolution of 12 December 1974.⁸³⁾ (Emphasis added) At any rate these are expressions of the idea that compensation for nationalization should be balanced against the past profits of the foreign owner of the property.⁸⁴⁾ In propounding a thesis "Pour un nouvel ordre économique international", Mohammed Bedjaoui forcefully denounces the colonialism and argues for its rectification in search of the "elimination of inequities".⁸⁵⁾

But it can be contended on the other hand that taking of an inventory of the past in this way should not be extended infinitely, for it could undermine the fundamental security of treaty and other legal relations of States. In

the course of the discussion of the draft articles of the law of treaties, and more specifically Article 53 on the legal consequences of the termination of a treaty, in the International Law Commission in 1966, Paul Reuter Stated:

"Suppose there was a rule of jus cogens that annulled territorial changes obtained by force or by other means contrary to the Charter. Would that rule apply only to treaties concluded after its emergence, or could it also apply to earlier treaties, such as treaties establishing a colonial protectorate? It would be agreed that nullity of that kind could not be extended into the past ad infinitum."86)

He wanted to stress that "there were many cases in which, even where jus cogens applied, the requirements of stability were important."87)

It is true that in the interpretation of facts and legal documents account must be taken of their historical context. In the Temple of Preah Vihear case of 1962 Judge Wellington Koo, impressed by the weak bargaining power of the Siamese Government vis-à-vis the French, defended that lack of reaction on the part of the Siamese. In the words of a commentator, "In that situation, the learned Judge added, it was wholly natural and reasonable that Siam should refrain from any reaction for fear of adverse consequences. Legal niceties, in short, must be interpreted with regard to political realities."88) "Confronted by what were in effect adverse 'acts of State' cloaked in Western legalities, [the Siamese authorities] found it prudent to react only ... by polite acquiescence."89) As the commentator says, "As a precedent, the Temple case may be dangerously narrow in declining to look beyond immediate questions of treaty law into the broad and equivocal sphere of historical justice."90) If this comment stresses the importance of the historical context in which interpretation should be made, the Namibia case of 1971 emphasizes the evolutionary aspect of the law. In interpreting Article 22 of the

Covenant of the League of Nations, the International Court of Justice states:

"The Court is bound to take into account the fact that the concept embodied in Article 22 of the Covenant ... were not static, but were by definition evolutionary, as also, was the concept of the 'sacred trust'. The Parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."⁹¹⁾

The same thing is meant by Edward McWhinney when he says: "The normative quality, in legal terms today, of the old International Law rules, is increasingly subjected to the test of reason: those rules are to be critically re-examined in the context of the historically limited space-time dimension of their origins, and then tested in terms of their claims, such as they may be, to continuing relevance and reasonableness in the larger World Community of our times."⁹²⁾

International law has, as any law does, a dual requirement of development or change and stability. Excessive emphasis on one to the detriment of the other destroys the normal evolution of international law. This is rightly pointed out in a resolution of l'Institut de Droit International on "Le problème intertemporel en droit international public" of 1975. In its preamble the resolution recites:

"Considérant le besoin de favoriser l'évolution de l'ordre juridique international tout en sauvegardant

le principe de la sécurité juridique, élément essentiel de tout système de droit;

Considérant que toute solution d'un problème intertemporel dans le domaine international doit tenir compte de ce double impératif de l'évolution et de la sécurité;

Considérant qu'un problème comparable se pose quand une règle se réfère à une notion dont la portée ou la signification a varié dans le temps, ..."93)

Now to turn to cultural aspects of equity, it is well to remember Article 9 of the Statute of the International Court of Justice, where reference is made to the importance of fair representation of various cultural values in these terms:

"At every election, the electors shall bear in mind ... that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."94)

Since it is impossible to represent all the different forms of civilization and legal systems of the world, it seems agreed that Article 9 is a fair compromise. Yet critical comments have off and on been made on the Court's findings. For example, Judge Sir Percy Spender, in his dissent in the Temple of Preah Vihear case (merits) of 1962, presented an argument which carries not only historical but cultural overtones:

"It would not, I think, be just to apply to the conduct of Siam in this period objective standards comparable to those which reasonably might today be or might then have been applied to highly developed European States."95)

Views in the same vein are expressed in the symposium on "Judicial Settlement of International Disputes" of 1972

sponsored by the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, much as in the Hague Academy's workshop in 1983 on "The Future of International Law in a Multicultural World", which we have briefly discussed above in the Introduction. T. O. Elias "wished to construe Article 9 of the Statute as not emphasizing the principal legal 'systems' in the traditional sense, but rather the distinctive legal 'cultures' which had grown beyond the range of civil law and common law systems. These clearly distinguishable cultures that had been developing within Latin America, Asia and Africa should be given as fair representation as possible."⁹⁶⁾ Shabtai Rosenne stated: "The Chinese concept of a civilized society placed far greater importance on conciliation than on judicial settlement. This conception was increasingly in evidence the further one went eastwards from the Mediterranean. And if the International Court was to be a truly international court, it must absorb into its intellectual reservoir some of these other ideas about how a court fitted into different mechanisms or formulae for the settlement of disputes."⁹⁷⁾ Jean Salmon pointed out: "The information given about practice in China and Africa also indicated that the conception of international adjudication was perhaps too strongly marked with the stamp of European thinking and unsuitable for exportation to other parts of the globe. The task facing European lawyers was rather to understand than to condemn or to rest complacently on their own laurels. It was not a question of relinquishing the ICJ and arbitration. On the contrary, they must be vigorously defended, but only in those spheres where such procedures were appropriate--in areas where both parties were satisfied with the law to be applied and consented to the proceedings."⁹⁸⁾

Indeed there are striking contrasts between the Western and non-Western conceptions of legal significance, as it was made clear in the Hague Academy's workshop of 1983. After referring to a number of instances in which the West and non-Western States have different legal concepts due to their different cultural values--

predominant importance of the tribe under cover of the State façade, relations of war and peace differently perceived, different concepts of dispute settlement, the rigid notion of contract in the West and preference of harmony or equitable adaptation of contract in the non-Western States, etc.--,⁹⁹⁾ René-Jean Dupuy concludes:

"Toutes ces observations du comparatiste éclairent l'internationaliste sur les malentendus qui opposent à l'heure présente les juristes tiers-mondes et ceux qui, en Occident, restent attachés au positivisme."¹⁰⁰⁾

As it is correctly pointed out by Oscar Schachter, international law is not 'value-free' in the sense that physics or chemistry is.¹⁰¹⁾ It is important to keep in mind the 'malentendus' based on different cultural values in the interpretation of facts and law. "It would be excessively optimistic, even fatuous," as Schachter says, "to assume that a collective effort in international law on a truly international scale could ignore these profound differences or cover them up with high-sounding generalities."¹⁰²⁾

In more specific terms, it is likely that a State traditionally more accustomed to conciliation than to adversary adjudication lacks a diligent sense of rules of procedure for adjudication. It may thus be suspected that such a State is likely to face an unfavourable finding by the tribunal. There seems to be ample evidence to support this suspicion in the fact that at least in the recent arbitral and judicial cases most of the parties to the dispute have employed as their counsel experienced British or French international lawyers who are believed to be well versed in adjudicative rules of procedure.¹⁰³⁾

On the other hand it may be cautioned that as cultural considerations can be as selective as arbitrary, they must be given in good faith. The international judge or arbitrator may feel bound to deal with such considerations as part of the "relevant circumstances" presented by the

parties, rather than ignoring them as extra-legal factors. But inasmuch as he is not free from latent or subconscious cultural values, it is desirable that he should act with the greatest care to ensure as fair a judgment of the merits as possible.

Conclusions

We have seen the growing reference to equity in the problems of international law in the recent years. It is abundantly found in some of the recent treaty clauses, notably those of the United Nations Convention on the Law of the Sea of 1982 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983, and the most recent arbitral and judicial decisions on maritime boundary delimitation.¹⁾

There is a growing awareness among States of the importance of equity in international law and relations, and naturally this has given rise to a considerable number of publications discussing equity, most of them in its favour.²⁾ Thus although there is admittedly some criticism of the application of equity which has various 'dangers',³⁾ there is evidence that the raison d'être of equity as States see it is growing. This is so especially in the settlement of disputes.

Contemporary disputes are increasingly complex, with multi-faceted issues involved, and require multi-dimensional settlement. A variety of circumstances are entangled in a dispute in such a complicated way that it may not be amenable to a clear-cut solution which decides entirely in favour of one party or determines one party's justice and the other's injustice. As a Japanese expert in the law of civil procedure writes in his recent general treatise on law, such a dispute would require a reconciliatory settlement taking account of the respective equities of the parties in search of the extent to which as members of the same community they should share the forbearance or loss incurred.⁴⁾ This mode of settlement contrasts with the modern Western type of adjudication which opposes one party to the other in a legal struggle before the tribunal.⁵⁾ As it is, however, this seems to be an overstatement in view of the present perception that States have of the nature of the international society.

But this is not the end of the matter. When an

equitable solution of the dispute is stressed, as in some of the recent arbitral and judicial decisions on maritime boundary delimitation, the implication is that it is somewhat reconciliatory settlement acceptable to both parties as immediately interested neighbours, if not as members of the international society. This would be the reason why reference to "equitable principles" and "relevant circumstances" to be taken into account has recurred. Especially the emphasis on the need to take account of "all the relevant circumstances" makes a sharp contrast with the traditional method of singling out the relevant issues of the dispute for the application of the law. Could this then constitute a departure from the traditional mode of applying the relevant legal rules and principles?

If, as is generally agreed, the consideration of "relevant circumstances" is part of the application of law, it follows that an expanded scope of "relevant circumstances" should lead to an expanded notion of law. Law evolves. Any rule of law, at the time of its formation, cannot predict every conceivable future situation to which it is to be applied.⁶⁾ It tends to lag behind developments of fact. It is here in the fact-law gap that equity can play its role. In the words of B. A. Wortley,

"A legal order that recognizes no equity would be hard indeed and difficult to imagine. Such an order might work to some extent in a static society that demanded nothing more than a 'slot machine' method of justice, ... But in a dynamic and changing society, law without the moderation of equity, without some discretion in permitting remedies and in awarding punishment, seems inconceivable."⁷⁾

More particularly new developments in international relations make States aware of the advisability of equity. As Paul Reuter points out:

"la puissance de l'homme sur la nature s'est étendue, mais à travers l'intervention de l'Etat et c'est aux Etats que les nouvelles richesses sont attribuées; les sociétés humaines ici se fragmentent, là s'unifient; de nouvelles répartitions des éléments constitutifs des Etats en résultent; ainsi naissent les nouveaux domaines d'équité."⁸⁾

Similarly in the domestic context of the United States equity seems to have filled the gap created by the new social and economic developments, as it is reported by Brendan F. Brown:

"Many examples are available to demonstrate that legal justice lags behind equitable justice in the United States. ... Only equity, not law, has been able to solve the many problems of contemporary society, caused by the emergence of new forms of property, and by changing economic and social conditions."⁹⁾

And this American example is not an isolated case. As a well documented research on the role of private law principles in the development of international law shows,

"There exists a customary rule of international law to the effect that 'general principles of law', 'justice' and 'equity' should, in addition to and apart from custom and treaties, be treated as binding upon international tribunals. These sources, which are shown by the practice of international tribunals to connote legal rules proper and not precepts ex aequo et bono, are, for the most part, identical with generally recognized rules of private law."¹⁰⁾

The same study, done in the mid-1920s, concludes that "the approximation to corresponding general principles of private law is, as a rule, tantamount to the realization of a principle of justice and equity hitherto obscured by the

part which force plays in international relations."¹¹⁾

Indeed what was not questionable in the Euro-centric international legal context in the nineteenth century has come to be questioned by a large number of newly independent States in the latter half of this century. These States, for example, have put forward claims for a new international economic or information order in the general trend of 'decolonization'. In so far as they seek to establish new legal norms, such claims inevitably come into conflict with the traditionalist position of the older, developed States.

This tendency is re-inforced by the growing particularism in the world today that sets count on cultural and historical particularities. When a specific dispute arises between a State with new values and another which adheres to traditional norms under these circumstances, an equitable solution would seem to require a balanced consideration of the equities of both parties unless customary international law indicates that one or the other is patently wrong. New social and economic conditions may defy the strict application of traditional rules and principles of law, but require instead an adequate consideration of various relevant circumstances for an equitable settlement of the dispute.

Thus it has been shown that emerging necessities of international relations are the principal basis for the functioning of equity. But it must be remembered that equity is basically a particularized form of justice.¹²⁾ In this sense we could rightly conclude with Daniel Bardonnnet that "on ne doit pas oublier que l'équité constitue le fondement même du droit, car, comme le remarquait Hauriou, 'le droit réside dans le discernement du juste et de l'injuste.'"¹³⁾

Notes: Introduction

1. Waldock, C. H. M., "The Decline of the Optional Clause", 32 BYBIL 244-287 (1955-56); Taoka, Ryoichi, "The Optional Clause: Past and Present" (in Japanese), 63 Hogaku Ronso (Kyoto University Law Review) 6ff. (1958); Taijudo, Kana'e, "The Decline of International Adjudication and the Afro-Asian States" (in Japanese), 89 Hogaku Ronso 1ff. (1971).
2. Taijudo, supra note 1, at 7-11; Gross, Leo, "Conclusions", in id. (ed.), The Future of the International Court of Justice, Vol. 2, 1976, p. 736.
3. Tunisia and Libya signed a special agreement on 10 June 1977 to submit their dispute over the delimitation of the continental shelf boundary, and the judgment in this case was rendered on 24 February 1982; Libya and Malta signed a special agreement on 23 May 1976 to submit their dispute over the continental shelf boundary delimitation, and the judgment was rendered on 3 June 1985; Upper Volta (now Burkina Faso) and Mali signed a compromis on 16 September 1983 to submit their dispute over the delimitation of their common frontier to a Chamber of the International Court of Justice which delivered its judgment on 22 December 1986; Nicaragua filed an Application on 9 April 1984, instituting proceedings against the United States of America in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua, and an Order was given on 10 May 1984, indicating some provisional measures, and judgments on the Court's jurisdiction and the merits were rendered on 26 November 1984 and 27 June 1986 respectively. On the other hand, France withdrew its declaration of acceptance of the Court's compulsory jurisdiction as a result of its dissatisfaction with the Court's treatment of its series of nuclear tests in the South Pacific, while the United States decided to withdraw from the proceedings initiated by Nicaragua, clarifying its position against the Court's jurisdiction "in this type of case" despite the Court's judgment of 26 November 1984 that it has its jurisdiction in this case, and terminated its declaration of acceptance of the Court's compulsory jurisdiction on 7 October 1985. See Department of State, Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, 18 January 1985, and Observations on the International Court of Justice's November 26, 1984 Judgment on Jurisdiction and Admissibility in the Case of Nicaragua v. United States of America, 24 ILM 246-263 (1985), and the Secretary of State's letter of 7 October 1985, 24 ILM 1742 (1985).
4. See, for example, Bedjaoui, Mohammed, Towards a New International Economic Order, 1979.
5. Cf. Tucker, Robert W., The Inequality of Nations, 1977, pp. 64-65, 117.
6. Cf. McWhinney, Edward, "Equity in International Law", in Newman, Ralph A. (ed.), Equity in the World's Legal Systems: A Comparative Study, 1973, p. 587; Cayuga Indians case, 6 RIAA 181.
7. Fitzmaurice, Gerald G., "The United Nations and the Rule of Law", 38 Transactions of the Grotius Society 145 (1953).

8. Ibid. 148.
9. ICJ Reports, 1970, pp. 84-86, paras. 35-36.
10. Fitzmaurice, Sir Gerald G., "The Future of Public International Law and of the International Legal System in the Circumstances of Today", in Institut de Droit International, Livre du Centenaire 1873-1973: Evolution et perspectives du droit international, 1973, p. 326.
11. See infra, Chapter III, for more details. For earlier examples of such considerations, see the Grisbadarna and Fisheries cases.
12. See Chapter III.
13. Institut de Droit International, 49-II Annuaire 370-373 (1961). Article 3 provides:

"Si les Etats sont en désaccord sur la protection de leurs droits d'utilisation, le règlement se fera sur la base de leurs besoins respectifs, ainsi que des autres circonstances propres au cas d'espèce."

Article 4 then reads:

"Un Etat ne peut procéder à des travaux ou utilisations des eaux d'un cours d'eau ou d'un bassin hydrographique qui affectent sérieusement les possibilités d'utilisation des mêmes eaux par d'autres Etats qu'à condition de leur assurer la jouissance des avantages auxquels ils ont droit conformément à l'article 3, ainsi qu'une compensation adéquate pour les pertes et dommages subis."

Ibid. 371-372.
14. International Law Association, Report of the 52nd Conference, Helsinki, 1966, 1966, pp. 477-533. Article IV runs:

"Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."

Article V provides:

"(1) What is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case.

(2) Relevant factors which are to be considered include, but are not limited to:

 - (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
 - (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
 - (c) the climate affecting the basin;
 - (d) the past utilization of the waters of the basin, including in particular existing utilization;
 - (e) the economic and social needs of each basin State;
 - (f) the population dependent on the waters of the basin in each basin State;
 - (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
 - (h) the availability of other resources;
 - (i) the avoidance of unnecessary waste in the utilization of waters of the basin;

- (j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
- (k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

(3) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole."

Ibid., pp. 486, 488.

15. Text in United Nations document A/CONF.62/122. See, for example, Articles 59 (Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone), 69 (Right of land-locked States), 70 (Right of geographically disadvantaged States), 74/83 (Delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts), 82 (Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles), 140 (Benefit of mankind), 150 (Policies relating to activities in the Area), 151 (Production policies), 155 (The Review Conference), 160 (Powers and functions of the Assembly), 162 (Powers and functions of the Council), 266 (Promotion of the development and transfer of marine technology), and 293 (Applicable law).

16. Text in United Nations document A/CONF.117/14. See, for example, concerning State property, Articles 17 (Separation of part or parts of the territory of a State), 18 (Dissolution of a State); concerning State archives, Articles 28 (Newly independent States), 31 (Dissolution of a State); and concerning State debts, Articles 37 (Transfer of part of the territory of a State), 40 (Separation of part or parts of the territory of a State), 41 (Dissolution of a State).

17. Schachter, Oscar, Sharing the World's Resources, 1977, pp. 142-143; Tucker, supra note 5, p. 117.

18. Judge Jessup, in his separate opinion in the North Sea Continental Shelf cases, states: "... it is of course obvious that the reason why they (=the parties) are particularly concerned with the delimitation of their respective portions is the known or probable existence of deposits of oil and gas in that seabed." ICJ Reports, 1969, p. 66. See also Miyoshi, Masahiro, "The Japan-South Korea Agreement on Joint Development of the Continental Shelf", 10 Energy 553 (1985).

19. McDorman, Ted L., et al., Maritime Boundary Delimitation: An Annotated Bibliography, 1983, pp. 1-156.

20. Chemillier - Gendreau, M., "La Signification des Principes équitables dans le Droit international contemporain", 16 RBDI 509-510 (1981-82).

21. Académie de Droit International de La Haye, Colloque 1983: L'Avenir du Droit international dans un Monde multiculturel, 1983, 491 pages.

22. Khadduri, Majid, "Islamic Law and International Law", ibid., p. 157.
23. Bozeman, Adda B., "An Introduction to Various Cultural Traditions of International Law - A Preliminary Assessment", ibid., p. 103.
24. Cassese, Antonio, "The Concept of Law Upheld by Western, Socialist and Developing Countries", ibid., p. 324.
25. Ibid., p. 325.
26. Mbaye, K., "Intervention" in "Résumé des Débats", ibid., pp. 361-362.
27. David, René, "L'Arbitrage, Solution d'Avenir pour le Droit international", ibid., p. 403.
28. Sompong, Sucharitkul, "L'Humanité en tant qu'Elément contribuant au Développement progressif du Droit international contemporain", ibid., p. 423.
29. De Lacharrière, Guy, "Le Point de Vue du Juriste: la Production et l'Application du Droit international dans un Monde multiculturel", ibid., pp. 70-71.
30. Anand, R. P., "The Role of Asian States in the Development of International Law", ibid., p. 113.
31. Bedjaoui, Mohammed, "Intervention" in "Résumé des Débats", ibid., p. 195.
32. Sanson, H., "Intervention" in "Résumé des Débats", ibid., p. 189.
33. Dupuy, René-Jean, "Conclusions du Colloque", ibid., p. 454.
34. In his preparatory report on arbitration and conciliation, Holsti pointed out that in the case of a juridical dispute, the task is "to ascertain and apply the appropriate rule of law". But in the case of non-juridical disputes, "the arbitrator's task goes beyond such a purely juridical function and becomes political, and even possibly legislative in character. The arbitrators must be authorized to decide ex aequo et bono; and possibly they may have to be invested with quite special powers not covered even by this formula." League of Nations, Minutes of the Second Session of the Committee on Arbitration and Security (L.N. Doc. 165.M.50.1928.IX; L.N. Publs. No.1928.IX.6), p. 127, as quoted in Sohn, Louis B., "The Function of International Arbitration Today", Académie de Droit International de La Haye, 108 Recueil des Cours 51 (1963-I). In a Circular Note dated 3 March 1960, Secretary-General of the Permanent Court of Arbitration states that in "cases where parties agreed to settle their differences ex aequo et bono, the arbitral tribunal is definitely a more appropriate organism" than the International Court of Justice, and that the "decision ex aequo et bono can be of value in cases where the settlement of non-juridical differences is concerned." 54 AJIL 935-936 (1960).
35. Aristotle, The Nicomachean Ethics, English translation by H. Rackham, The Loeb Classical Library, 1956, pp. 315-317.

36. Tanaka, Kotaro, "Conscience and Independence of the Judge", in Tanaka, The Rule of Law and Adjudication (in Japanese), 1960, p. 54. Those very words are quoted by Shimoda, Takeso, the diplomat turned Supreme Court judge, in his "My Curriculum Vitae" (in Japanese), Nihon Keizai Shimbun, 26 July 1977. Cf. Wortley, B. A., Jurisprudence, 1967, p. 390.

37. Macdonald and Johnston point out this state of affairs. Macdonald, R. St. J., and Douglas M. Johnston, "International Legal Theory: New Frontiers of the Discipline", in Macdonald and Johnston, The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory, 1983, pp. 4-5.

38. To such a general tendency would be ascribed the establishment of the New Commonwealth Institute whose object was the "study of fundamental principles of international relations and research into the particular problems of international justice and security" and its sister institution, the New Commonwealth Society with the object of the "promotion of International Law and Order through the Creation of an Equity Tribunal and an International Police Force". The Institute's Monograph series include Habicht, Max, The Power of the International Judge to give a Decision ex aequo et bono, 1935, and Friedmann, Wolfgang, The Contribution of English Equity to the Idea of an International Equity Tribunal, 1935. For a description of the mentioned tendency during the period, see Sohn, supra note 34, at 91-96.

39. Lord Davies, David, Force, 1934, p. 73, as cited in Sohn, supra note 34, at 91.

40. See Habicht, Max, Post-War Treaties for the Pacific Settlement of International Disputes: A Compilation and Analysis of Treaties of Investigation, Conciliation, Arbitration, and Compulsory Adjudication, Concluded during the First Decade Following the World War, 1931.

41. See Statement of Feldman, Mark B., Hearing before the Committee on Foreign Relations, United States Senate, March 18, 1981, p. 19. For detailed analyses of the composition of the Chamber, see Zoller, Elizabeth, "La Première Constitution d'une Chambre spéciale par la Cour internationale de Justice: Observations sur l'Ordonnance du 20 Janvier 1982", 86 RGDIP 305-324 (1982); Brauer, Robert H., "International Conflict Resolution: The ICJ Chambers and the Gulf of Maine Dispute", 23 Va.J.I.L. 463-486 (1983); Robinson, Davis R., et al., "Some Perspectives on Adjudicating before the World Court: The Gulf of Maine Case", 79 AJIL 581-583 (1985).

42. Gross suggests that the International Court of Justice might as well pay heed to "the trend for states to submit disputes to arbitral tribunals rather than to the Court". Gross, Leo, "The Dispute between Greece and Turkey concerning the Continental Shelf in the Aegean", 71 AJIL 47-48 (1977). Sohn is more emphatic in pointing out this trend:

"While some years ago it had been thought that international arbitration would soon be replaced by international courts in the settlement of international legal disputes, arbitration has been able to keep its place among international institutions of dispute resolution. Lately, in fact, arbitration seems to find more favor among many States. Most of the multipartite treaties which contain provisions on the settlement of disputes provide

for the arbitration of disputes relating to their interpretation and application rather than for the submission of such disputes to an international court."

Sohn, Louis B., "The Role of Arbitration in Recent International Multilateral Treaties", 23 Va.J.I.L. 188-189 (1983).

43. Letter from the permanent delegation of the Netherlands to the United Nations, 1 April 1953, in Annex I of the Report of the International Law Commission to General Assembly, A/2456, ILC Year Book, 1953, Vol. II, p. 235.

Notes: Chapter I

1. Habicht, Max, Post-War Treaties for the Pacific Settlement of International Disputes: A Compilation and Analysis of Treaties of Investigation, Conciliation, Arbitration, and Compulsory Adjudication, Concluded during the First Decade Following the World War, 1931, p. 1052, where the author concludes: "Equity in international arbitration treaties can, therefore, be taken only in its general sense, as equivalent to the French équité, or the German Billigkeit." (Emphasis original) The Memorandum prepared by the Secretariat on "Arbitral Procedure", dated 21 November 1950, states: "Outside of Anglo-Saxon law, equity has a broader meaning, though apparently still within the concept of law." United Nations document A/CN.4/35, ILC Year Book, 1950, Vol.II, p. 175, para. 90.
2. Friedmann, Wolfgang, The Contribution of English Equity to the Idea of an International Equity Tribunal, 1935, p. 17; Jenks, C. W., "Equity as a Part of the Law Applied by the Permanent Court of International Justice", 212 Law Quarterly Review 525 (1937); Bardonnnet, Daniel, "Equité et Frontières terrestres", Mélanges offerts à Paul Reuter: Le Droit international: Unité et Diversité, 1981, p. 70.
3. See Rousseau, Charles, Droit international public, tome 1, 1970, pp. 400-405.
4. ICJ Reports, 1969, p. 47, para. 85.
5. See, for example, the argument of Professor Oda, counsel for the Federal Republic of Germany, at the 3rd public hearing on 25 October 1968, ICJ Pleadings, 1968, Vol. 2, pp. 61-62.
6. Cf. Witenberg, J. C., L'Organisation judiciaire: La Procédure et la Sentence internationales: Traité pratique, 1937, p. 306, note (3).
7. Munkman, A. L. W., "Adjudication and Adjustment--International Judicial Decision and the Settlement of Territorial and Boundary Disputes", 46 BYBIL 15-16 (1972-73).
8. Witenberg, supra note 6, p. 304.
9. Ibid., p. 305.
10. 5 RIAA 355.
11. Witenberg, supra note 6, p. 305.
12. Ibid., p. 306.
13. Munkman, supra note 7, at 13-14. Cf. Rousseau, supra note 3, pp. 405-415.
14. Degan, V. D., L'Equité et le Droit international, 1970, pp. 25-35. On the function infra legem, see Huber, Max, "Observations" on Borel, E., "La Compétence du Juge international en Equité", Institut de Droit international, 38 Annuaire 233 (1934), where he states: "La conception la plus étroite de l'équité est celle

qui comporte, entre plusieurs interprétations possibles du droit, celle qui tient le mieux compte de la situation individuelle des parties en litige et de la balance des droits et obligations correspondants." De Visscher has this to say: "On peut dire que toute application du droit, si conforme qu'elle soit au droit international positif, implique un certain degré d'équité." 86 Recueil des Cours 540 (1954-II). Akehurst says: "An international judge does the same; he does not deny that the legal rule is binding, he merely holds that it does not apply to the facts of the case. The equitable exception is applicable and the legal rule is not, because the equitable exception is more specific than the legal rule; lex specialis derogat generalis." "The Hierarchy of the Sources of International Law", 47 BYBIL 280 (1974-75). Bardonnnet comments to the same effect, supra note 2, at 55.

As for the functions of equity praeter legem and contra legem, Huber contrasts the function infra legem with these in the same "Observations": "L'équité ainsi comprise s'accommode facilement avec le règlement arbitral et même judiciaire. Tout autre est la situation, si l'équité est comprise comme une base indépendante du droit pour des décisions arbitrales." 38 Annuaire 233 (1934). De Visscher refers to these functions "comme source de droit autonome et indépendante, distincte non seulement des traités et de la coutume mais encore des 'principes généraux de droit reconnus par les nations civilisées'". Ibid. 239. Bardonnnet, in discussing the demarcation of the boundary between France and Spain in the central Pyrenees based on the Treaty of 14 April 1862, mentions the Demarcation Commission's work as an instance "d'arrangements et de compensations, en s'appuyant sur des considérations d'équité pour écarter la limite conventionnelle". supra note 2, at 53-54. See also ibid. 48.

15. De Visscher, L'Equité dans le Règlement arbitral ou judiciaire des Litiges de Droit international public, 1972, p. 12; Munkman, supra note 7, at 14.

16. ILC Year Book, 1979, Vol. II, Part Two, p. 24, para 22. Both before and after this report of 1979, the reports and discussions on the "Succession of States in Respect of Matters Other Than Treaties" included the discussion of equity. See, for example, the records of 1500th meeting, 14 June 1978 through 1504th meeting, 21 June 1978, 1514th meeting, 10 July 1978 through 1516th meeting, 12 July 1978, ILC Year Book, 1978, Vol. I, pp. 141-167, 209-223.

17. ICJ Reports, 1969, p. 33, para. 47; p. 47, para. 85.

18. ICJ Reports, 1982, p. 59, para 70.

19. Ibid., p. 60, para 71.

20. For details of the legislative history, see Chapter II infra.

21. Except at least Hagerup, the Norwegian member, who insisted: "La Cour ne devrait recourir à l'équité que si elle y a été autorisée par les parties." Permanent Court of International Justice, Procès-verbaux of the Proceedings of the Advisory Committee of Jurists 16 June-24 July 1920, 1920, p. 296.

22. Ibid., pp. 332, 730.

23. League of Nations, The Records of the First Assembly: Meetings of the Committees, Vol. 2, 1920, p. 403.

24. Sohn, Louis B., "Arbitration of International Disputes Ex aequo et bono", Sanders, Pieter (ed.), International Arbitration: Liber Amicorum for Martin Domke, 1967, pp. 331-332.

25. Bardonnnet, supra note 2, at 73. He was discussing the controversial, easternmost portion of the boundary line at Nagar Parkar.

26. Munkman, supra note 7, at 81. It is interesting to recall that in the Norwegian Shipowners' Claims case of 1922 the tribunal, in discussing "The Law Governing the Arbitration", quoted the interpretation of Heinrich Lammasch on the phrase "sur la base du respect du droit" in Article 37 of the Hague Convention on the Pacific Settlement of International Disputes of 1907, according to which the phrase has "no other meaning than that 'the arbiter shall decide in accordance with equity, ex aequo et bono, when positive rules of law are lacking" 1 RIAA 330-331. Here the expressions "in accordance with equity" and "ex aequo et bono" are considered as identical or interchangeable. When the International Law Commission was about to discuss "Arbitral Procedure", Special Rapporteur Georges Scelle, in the "Observations préliminaires" of his first report of 1950, refers to Article 37 of the Hague Convention of 1907 and states that if the phrase "sur la base du respect du droit" is taken literally, it excludes "l'amiable composition, sinon le jugement d'équité, ex aequo et bono." "Toutefois," he continues, "nous pensons qu'il y a une différence entre le jugement ex aequo et bono, ou jugement d'équité, et l'amiable composition." A/CN.4/18, 21 mars 1950, ILC Year Book, 1950, Vol. II, p. 116. Here distinction is made between equity or ex aequo et bono on the one hand and amiable composition on the other, with no distinction made between the first two terms. This is incorporated in his "Avant-projet de texte proposé: (Article) IV, ibid., p. 149 and "Second avant-projet sur la procédure arbitrale", Deuxième rapport, A/CN.4/46, 28 mai 1951, ILC Year Book, 1951, Vol. II, p. 118.

To much the same effect of no strict distinction would be the following comment by Jonathn I. Charney who often writes on maritime boundary law both in the domestic and international fields: "Aside from the formal choice of the parties, there is no strict distinction that can be drawn between decisions made according to legal rules and those made ex aequo et bono. There are wide variations in rules of international law. Some are rather strictly stated and applied Other rules are more flexible and allow for the introduction of various considerations and judgments Consequently, the law may be fact intensive or it may be rule intensive. One may accordingly consider the relationship between decisions pursuant to rules of international law and those ex aequo et bono to be based on a continuum." Charney, Jonathan I., "Ocean Boundary Between Nations: A Theory for Progress", 78 AJIL 586-587 (1984).

27. Brierly, James L., "The General Act of Geneva, 1928", 11 BYBIL 131 (1930). See also id., The Law of Nations: An Introduction to the International Law of Peace, 6th edition (by C. H. M. Waldock), 1963, p. 372.

28. Lauterpacht, H., "The Absence of the International Legislature and the Compulsory Jurisdiction of International Tribunals", 11 BYBIL 150, 151 (1930); The Function of Law in the International Community, 1933, pp. 325, 327; The Development of International Law by the International Court, 1958, p. 213; International Law: Collected Papers (edited by E. Lauterpacht), Vol. 1, 1970, p. 256.

29. De Visscher, Charles, supra note 14, 86 Recueil des Cours 542 (1954-II).

30. Jenks, C. W., The Prospects of International Adjudication, 1964, pp. 319-320; Fitzmaurice, Gerald, "The Future of Public International Law and of the International Legal System in the Circumstances of Today", Institut de Droit International, Livre du Centenaire 1873-1973: Evolution et perspectives du droit international, 1973, p. 326. See also Guggenheim, Paul G., Traité de Droit International Public, tome I, 1953, p. 160.

31. ICJ Pleadings, 1968, Vol. 2, p. 200.

32. Institut de Droit International, Tableau général des Résolutions (1873-1956), 1957, p. 162.

33. Ibid.

34. 93 LNTS 354.

35. Brierly, supra note 27, 11 BYBIL 125 (1930).

36. 6 RIAA 183.

37. PCIJ Publications, Series A, No.24, pp. 10, 11. See also the Diversion of Water from the Meuse case, PCIJ Publications, Series A/B, No.70, p. 76, where Judge Hudson refers to the point in his individual opinion.

38. ICJ Reports, 1969, p. 48, para. 88. All the recent arbitral and judicial cases on territorial and boundary disputes make the procedural requirement of prior agreement of the parties clear when they make any reference to the procedure ex aequo et bono. The Rann of Kutch case, 17 RIAA 11; The Beagle Channel case, Government of the Republic of Chile, Report and Decision of the Court of Arbitration: Beagle Channel Arbitration between the Republic of Argentina and the Republic of Chile, 1977, p. 56, para 7; the Tunisia-Libya Continental Shelf case, ICJ Reports, 1982, p. 60, para 71; the Gulf of Maine case, ICJ Reports, 1984, p. 278, para 59. It is implied, if not expressly referred to, in the Libya-Malta Continental Shelf case, ICJ Reports, 1985, para 45.

39. The International Law Commission briefly referred to this point when it was discussing equity in connection with the draft articles on the succession of States in respect of matters other than treaties. ILC Year Book, 1979, Vol. II, Part Two, p. 24, para. 24.

There could further be raised the question whether the power to decide ex aequo et bono has anything in common with, or is the same power as, that of an amiable compositeur. Some arbitration clauses treat the two as synonymous while others appear to see them differently. Georges Scelle, as Special Rapporteur on Arbitral

Procedure in the International Law Commission, distinguished between them. See his first report, A/CN.4/18, 21 mars 1950, ILC Year Book, 1950, Vol. II, p. 116. This will be discussed in Chapter II below.

40. General arbitration clauses and compromis will be discussed in Chapter II and arbitral and judicial decisions dealing with territorial and boundary disputes in Chapter III.

41. ICJ Reports, 1969, p. 54, para 101. Five similar "relevant circumstances" are listed in the Tunisia-Libya Continental Shelf case, ICJ Reports, 1982, p. 93, para 133. Similarly three such "circumstances and factors" are mentioned in the Libya-Malta Continental Shelf case, ICJ Reports, 1985, para. 79. For a phrase with the same import in a similar wording to "the circumstances peculiar to a given case", but not in a judicial decision, see the Résolution of the Institut de Droit International of 1961 on "Utilisation des eaux internationales non maritimes (en dehors de la navigation)", Article 3, which reads:

"Si les Etats sont en désaccord sur la portée de leurs droits d'utilisation, le règlement se fera sur la base de l'équité, en tenant compte notamment de leurs besoins respectifs, ainsi que des autres circonstances propres au cas d'espèce."

49-II Annuaire 371 (1961).

42. ICJ Reports, 1969, p. 53, para. 101.

Notes: Chapter II

1. Conférence internationale de la paix, La Haye, 18 mai-29 juillet 1899, 1 Sommaire général 227. (Hereinafter cited as Sommaire général)
2. See Article 32 of the Vienna Convention on the Law of Treaties of 23 May 1969, U. N. Document A/CONF.39/27, p. 17.
3. 1 Sommaire général 111. The point of departure for the discussion of a convention for the pacific settlement of international disputes was the Russian proposals, which included "Elements pour l'élaboration d'un projet de Convention à conclure entre les Puissances participant à la Conférence de La Haye" and "Propositions russes concernant le Tribunal d'arbitrage". These proposed in combination that international arbitration should be systematized to consolidate its practice upon the recognition that it is the most effective and equitable method for the amicable settlement of disputes of a legal nature, such as "des questions de droit, et, en premier lieu, ... celles qui concernent l'interprétation ou l'application des traités en vigueur". (1 Sommaire général 156, 166) The British, American and Italian delegations presented their respective proposals or amendments concerning international arbitration (Proposition de S. E. sir Julian Pauncefote, 1 Sommaire général 174-5; Proposition nouvelle de S. E. sir Julian Pauncefote concernant le Conseil permanent, Ibid. 175; Projet de Tribunal international: Proposition de la Commission des Etats-Unies d'Amérique soumis au Comité d'Examen, Ibid. 176-7; and Amendement au projet russe de stipulation sur la médiation et l'arbitrage, déposé par S. E. le Comte Nigra, Ibid. 178.), but none of them had any reference to the basis of decision or the character of arbitration. A "Projet de Convention pour le règlement Pacifique des Conflits Internationaux", Article 14 of which was identical with the final Article 15, was first presented to the Comité d'Examen at its 15th meeting (or its special meeting) on 15 July 1899 (4 Sommaire général 178). It was later presented by the Comité d'Examen to the Troisième Commission, which adopted the Article at its 5th meeting on 17 July without discussion (Ibid. 21). The Troisième Commission again adopted the Article "sans modification" at its 7th meeting on 20 July (Ibid. 64). The Report of M. Descamps was prepared as a result of the discussion and deliberation in the Comité d'Examen of the Troisième Commission.
4. 1 Sommaire général 111.
5. 4 Sommaire général 93.
6. 1 Sommaire général 86.
7. Deuxième Conférence Internationale de la Paix, La Haye, 15 Juin-18 Octobre 1907, 1 Actes et Documents 336. (Hereinafter cited as Actes et Documents) Article 37, identically worded with Article 15 of the 1899 Convention was first adopted, as reported by Baron Guillaume, by Comité d'Examen A of the Première Sous-commission of the Première Commission at its 17th meeting on 1 October 1907 (2 Actes et Documents 572). The addition of a second paragraph seems to have been the only amendment that bore upon Article 15 of the 1899 Convention. Comité d'Examen A decided to transmit the report of Baron Guillaume direct to the Première Commission (Ibid. 589). As it is stated in the "Rapport

sur la révision de la Convention de 1899 pour le règlement pacifique des conflits internationaux par le Baron Guillaume", "L'article 15 n'a donné lieu à aucune discussion; ..." (1 Actes et Documents 416). In the Première Commission, Article 37, as amended to incorporate the Swedish proposal, was read by the President at its 5th meeting on 5 October, but no comments were given thereupon ("Pas d'observations". 2 Actes et Documents 89). The Article was finally adopted as such by the Plenary meeting of the Conference at its 9th meeting on 16 October 1907.

8. Lammasch, Heinrich, Die Rechtskraft internationaler Schiedssprüche 37 (1913), as quoted in the award of the Norwegian Ship-owners' Claims case, 1 RIAA 330-1.

9. The treaty of 3 February 1958 between Belgium, the Netherlands and Luxembourg instituting the Benelux Economic Unity has this same formula in Article 45 which runs:

"1. Le Collège arbitral statue sur la base du respect du droit. Avant de rendre sa sentence, il peut, dans tout état du litige, proposer à l'agrément des parties un règlement à l'amiable du différend.

2. Si les parties sont d'accord, le Collège arbitral statue ex aequo et bono." (381 UNTS 188)

The Convention of 6 February 1965 between Belgium and the Democratic Republic of Congo for the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony stipulates, in Article 13, that "Le tribunal statue sur la base du respect du droit". (540 UNTS 240)

10. 6 LNTS 405.

11. See, for example, the preamble of the Convention between the United States and Chile for the arbitration of Macedonian claims, signed at Santiago on 10 November 1858, which would seem to be the earliest example of the formula in modern times. Martens, G. F. de, Nouveau Recueil Général des Traités, I^e série, tome 17, I^e partie, p. 224. (Hereinafter cited as 17-I Martens NRG-I 224.)

12. At the 3rd meeting (private) of the Advisory Committee of Jurists on 18 June 1920 Mr. Ricci-Busatti stated as follows:

"La différence entre la politique et le droit, entre l'équité et la justice, entre un arbitrage et une décision judiciaire, a été fortement mise en relief. Tout de même, il est impossible de la définir exactement. En effet, dans l'opinion de M. Ricci-Busatti il n'y a pas de question qui ne puisse être résolue sur la base du droit, mais il n'y a pas non plus de différend entre Etats entièrement au dehors de toute considération politique. Il est également impossible de bien nettement fixer des limites entre le rôle des arbitres et celui des juges; ils exercent, dans bien des cas, les mêmes fonctions; leur origine est commune. L'équité, c'est enfin l'essence même du droit, qui n'en est que la forme.

"On ne peut donc pas baser la création de la nouvelle Cour sur des distinctions de cette sorte. ..."

Permanent Court of International Justice, Procès-verbaux of the Proceedings of the Advisory Committee of Jurists 16 June-24 July 1920, 1920, pp. 106-7. (Hereinafter cited as Process-verbaux 106-7.)

13. M. de Lapradelle stated:

"Cependant il serait trop strict et même injuste d'obliger la Cour à ne tenir compte que du droit. Il n'y a pas de danger à laisser à la Cour la faculté d'examiner si telle ou telle solution en droit est juste et équitable, et de corriger, le cas échéant, cette solution d'après les exigences de la justice et de l'équité. Il faut faire confiance aux juges et leur laisser la liberté de tenir compte eux-mêmes de ces différents éléments."

Procès-verbaux 296. See also ibid. 336.

14. Mr. Hagerup insisted on two points:

"1. il ne faut pas que la Cour puisse renoncer à prononcer une décision en alléguant qu'il n'y a pas de règles positives applicables;

2. s'il y a une règle de droit, il faut que la Cour soit obligée de l'appliquer. La Cour ne devrait recourir à l'équité que si elle y a été autorisée par les parties." (Ibid. 296)

15. Ibid. 344.

16. Ibid. 332.

17. Ibid. 351.

18. Ibid. 730.

19. League of Nations, The Records of the First Assembly: Meetings of the Committees, 1920, Vol. 1, p. 385. (Hereinafter cited as 1 Records, Committees 385.)

20. In an exchange of comments, Sir Cecil Hurst from Great Britain drew attention to the fact that the Anglo-American system recognized no difference between law and justice. Mr. Fernandes from Brazil said that he feared that the amendment would open the way to arbitrary decisions. Ibid. 385-6.

21. Ibid. 403.

22. Ibid. 403.

23. Ibid. 534.

24. League of Nations, The Records of the First Assembly: Plenary Meetings, 1920, p. 464. (Hereinafter cited as Records, Plenary 464.)

25. Ibid. 499.

26. The surmise is shared by Sohn, Louis B., "The Function of International Arbitration Today", Académie de Droit International de La Haye, 108 Recueil des Cours 47 (1963-I). It appears to be supported by Dr. Max Habicht, when he says:

"[The Assembly] wished to reserve the possibility for the Court to base its decision exclusively on the general principles of justice."

The Power of the International Judge To Give a Decision 'ex aequo et bono', 1935, p. 21. See also ibid., p. 68.

27. See Chapter I: Preliminary Reflexions.
28. Anzilotti, Dionisio. Corso di diritto internazionale (French translation), 3rd ed., 1929, pp. 19-20. Max Huber was of the opinion that "a clause of this nature is a welcome manifestation both of confidence in the Court and of the increasing range of the reign of law". Lauterpacht, Hersch, The Function of Law in the International Community, 1933, p.317, n.1. Judge Loder "saw in 1922 no reason why the Court should not have the power to decide ex aequo et bono". Ibid.
29. 93 LNTS 354.
30. See, for example, Brierly, J. L., "The General Act of Geneva, 1928", 11 BYBIL 125 (1930).
31. See below, Section 3-(1).
32. Manning 399.
33. 38 LNTS 366.
34. 96 LNTS 324.
35. 30 UNTS 96.
36. 10 UKTS 7 (1962, Cmnd. 1928).
37. 4 ILM 1123 (1964).
38. 14 ILM 1294 (1975).
39. 23 ILM 436 (1984).
40. 7 LNTS 31.
41. Ibid. 63.
42. 60 LNTS 267. Article 8, in much the same wording, of the 1953 Convention can be found in 212 UNTS 22.
43. 261 UNTS 166.
44. 58 UNTS 72.
45. 250 UNTS 118.
46. 381 UNTS 188.
47. Ibid. 271. The Dutch text reads: "op grondslag van de eerbiediging van het recht" (Ibid. 189), which means "on the basis of respect for law", as the French text does.
48. 587 UNTS 14. Similarly, reference to the Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity is provided in these treaties: Article 7 of the Convention between Cameroun, Chad, Niger and Nigeria relating to the Development of the Chad Basin, signed at Fort Lamy on 22 May 1964 (34 ZaöRV 77);

Article 35 of the Statute of the Organization of the Senegal Riparian States-OERS between Guinea, Mali, Mauritania and Senegal done at Labé on 24 March 1968 (672 UNTS 268); Article 14 of the Statutes of the African Groundnut Council of 27 October 1968 (846 UNTS 238), which was formerly the Articles of the African Groundnut Council, annexed to the Convention creating the African Groundnut Council, 18 June 1964; and Article 8 of the Agreement between Cameroun, Chad, Niger and Nigeria Establishing the Lake Chad Basin Commission Development Fund, signed at Yaoundé on 22 October 1972 (34 ZaöRV 82).

49. 788 UNTS 218.

50. 660 UNTS 230.

51. 9 ILM 115 (1970). To the same effect is Article 42, paragraph 1, of the Regulations of the Inter-American Commission on Human Rights of 8 April 1980. Oellers-Frahm - Wühler 300.

52. UN Publication, Sales No. E.83.V.5., p. 19.

53. Ibid., p. 24.

54. Ibid., pp. 26, 29-30.

55. Ibid., p. 139.

56. Ibid., p. 101.

57. 484 UNTS 374.

58. 575 UNTS 186.

59. 13 ILM 6 (1973).

60. 24 ILM 1309 (1985).

61. Rule 17. 20 ILM 1319 (1981).

62. 67 LNTS 100.

63. Austria - Sweden, Treaty of Conciliation and Arbitration, 28 May 1926, Article 17 (61 LNTS 200); Belgium - Denmark, Treaty of Conciliation, Arbitration and Judicial Settlement, 3 March 1927, Article 17 (67 LNTS 126); Belgium - Finland Treaty of Conciliation and Arbitration" 4 March 1927, Article 17 (69 LNTS 370); and Portugal - Sweden, Convention of Conciliation, Judicial Settlement and Arbitration, 6 December 1932, Article 16 (145 LNTS 91).

64. Manning 359. The same formula appears in: Bolivia - Brazil, General Arbitration Treaty, 25 June 1909, Article 10 (Manning 443-4) and Brazil - Peru, General Arbitration Convention, 7 December 1909, Article 9 (Manning 452).

65. 95 LNTS 96. The same wording is included in:
Spain - Sweden, Treaty of Conciliation, Judicial Settlement and Arbitration, 26 April 1928, Article 19 (77 LNTS 86);
Spain - Finland, Treaty of Conciliation, Judicial Settlement and Arbitration, 31 May 1928, Article 19 (82 LNTS 238);

France - Portugal, Treaty of Conciliation and Arbitration, 6 July 1928, Article 16 (126 LNTS 33);

Spain - France, Treaty of Arbitration, 10 July 1929, Article 19 (148 LNTS 378);

Finland - France, Treaty of Conciliation, Judicial Settlement and Arbitration, 28 April 1930, Article 19 (139 LNTS 390);

Norway - Portugal, Treaty of Conciliation, Judicial Settlement and Arbitration, 26 July 1930, Article 16 (134 LNTS 130); and

Bulgaria - Spain, Treaty of Conciliation, Judicial Settlement and Arbitration, 26 June 1931, Article 19 (166 LNTS 350).

66. UN Systematic Survey 796. For the original Spanish text, see 30 Martens NRG-III 190. Similar provisions are in the following clauses:

Spain - Netherlands, Treaty of Conciliation, Judicial Settlement and Arbitration, 30 March 1931, Article 19 (137 LNTS 170);

Sweden - Turkey, Treaty of Conciliation, Judicial Settlement and Arbitration, 19 February 1932, Article 19 (28 Martens NRG-III 78);

Denmark - Turkey, Treaty of Conciliation, Judicial Settlement and Arbitration, 8 March 1932, Article 19 (143 LNTS 232);

Norway - Turkey, Treaty of Conciliation, Judicial Settlement and Arbitration, 16 February 1933, Article 19 (161 LNTS 182); and

Venezuela - Colombia, Treaty of Non-Aggression, Conciliation, Arbitration and Judicial Settlement, 17 December 1939, Article 15, paragraph 3 (UN Systematic Survey 1124. The original Spanish text in 6 Tratados Públicos y Acuerdos Internacionales de Venezuela 567.)

67. 108 LNTS 214.

68. The phrase "ou à défaut de compromis" follows that of "Dans le silence du compromis" in the following, otherwise identical, clauses:

Belgium - Czechoslovakia, Convention of Conciliation, Arbitration and Judicial Settlement, 23 April 1929, Article 31 (110 LNTS 126);

Greece - Czechoslovakia, Pact of Friendship, Conciliation, Arbitration and Judicial Settlement, 8 June 1929, Article 33 (108 LNTS 268);

Belgium - Greece, Convention of Conciliation, Arbitration and Judicial Settlement, 25 June 1929, Article 31 (113 LNTS 130);

Norway - Czechoslovakia, Convention for the Pacific Settlement of All International Disputes, 9 September 1929, Article 31 (UN Systematic Survey 653-4);

Luxembourg - Czechoslovakia, Convention of Conciliation, Arbitration and Judicial Settlement, 18 September 1929, Article 31 (107 LNTS 62);

Luxembourg - Roumania, Convention of Conciliation, Arbitration and Judicial Settlement, 22 January 1930, Article 31 (110 LNTS 164);

Belgium - Yugoslavia, Convention of Conciliation, Judicial Settlement and Arbitration, 25 March 1930, Article 31 (106 LNTS 356);

Austria - Greece, Treaty of Friendship, Conciliation, Arbitration and Judicial Settlement, 26 June 1930, Article 31 (119 LNTS 366);

Belgium - Lithuania, Convention of Conciliation, Arbitration and Judicial Settlement, 24 September 1930, Article 31 (129 LNTS 412);

Austria - Norway, Convention of Conciliation, Arbitration and Judicial Settlement, 1 October 1930, Article 31 (119 LNTS 28);

Belgium - Bulgaria, Treaty of Conciliation, Arbitration and Judicial Settlement, 23 June 1931, Article 31 (137 LNTS 204);

Bulgaria - Norway, Treaty of Conciliation, Arbitration and Judicial Settlement, 26 November 1931, Article 31 (134 LNTS 40);

Denmark - Greece, Convention of Conciliation, Arbitration and Judicial Settlement, 13 April 1933, Article 31 (150 LNTS 478);

Bulgaria - Denmark, Treaty of Conciliation, Arbitration and Judicial Settlement, 7 December 1935, Article 31 (182 LNTS 194); and

Colombia - Uruguay, Convention of Conciliation and Arbitration, 21 November 1941, Article 14 (UN Systematic Survey 563-4. For the original Spanish text, see Colombia, Acto Legislativo y Leyes Expedidos por el Congreso Nacional, 1943, Sesiones Extraordinarias 78.).

69. 184 LNTS 110.

70. See supra note 30 and the accompanying text.

71. UN Systematic Survey 898.

72. 33 LNTS 98. The formula in the second paragraph is followed in these clauses:

Greece - Switzerland, Treaty of Conciliation, Arbitration and Compulsory Adjudication, 21 September 1925, Article 15 (Habicht 282);

Roumania - Switzerland, Treaty of Conciliation, Compulsory Arbitration and Judicial Settlement, 3 February 1926, Article 14 (55 LNTS 98);

Spain - Switzerland, Treaty of Conciliation, Arbitration and Judicial Settlement, 20 April 1926, Article 7 (60 LNTS 27-8);

Italy - Spain, Treaty of Friendship, Conciliation and Judicial Settlement, 7 August 1926, Article 7 (67 LNTS 379);

Chile - Italy, Treaty of Conciliation and Judicial Settlement, 24 February 1927, Article 16 (69 LNTS 284);

Italy - Lithuania, Treaty of Conciliation and Judicial Settlement, 17 September 1927, Article 16 (72 LNTS 446);

Portugal - Spain, Treaty of Conciliation, Arbitration and Judicial Settlement, 18 January 1928, Article 7 (77 LNTS 119);

Italy - Turkey, Treaty of Neutrality, Conciliation and Judicial Settlement, 30 May 1928, Article 5 of the Protocol annexed thereto (95 LNTS 190);

Finland - Italy, Treaty of Conciliation, Arbitration and Judicial Settlement, 21 August 1928, Article 15 (89 LNTS 32);

Greece - Italy, Treaty of Conciliation, Arbitration and Judicial Settlement, 23 September 1928, Article 20 (108 LNTS 226);

Italy - Norway, Convention of Conciliation, Judicial Settlement and Arbitration, 17 June 1929, Article 18 (105 LNTS 170);

Italy - Latvia, Treaty of Conciliation and Judicial Settlement, 28 April 1921, Article 17 (126 LNTS 406);

Colombia - Italy, Treaty of Conciliation and Arbitration, 18 March 1932, Article 16 (UN Systematic Survey 963. The original Spanish text in E. Guzman Esponda, Tratados y Convenios de Colombia, 1919-1938 749.);

Italy - Luxembourg, Treaty of Conciliation and Judicial Settlement, 15 April 1932, Article 15 (142 LNTS 126);

Italy - Panama, Treaty of Conciliation and Arbitration, 14 December 1932, Article 16 (UN Systematic Survey 994. The original Italian text in 45 Trattati e Convenzioni fra il Regno d'Italia e gli Altri Stati 502 (1932).);

Costa Rica - Italy, Treaty of Conciliation and Arbitration, 31 October 1933, Article 16 (UN Systematic Survey 1054. The original

Italian text in 46 Trattati e Convenzioni fra il Regno d'Italia e gli Altri Stati 385 (1933).);

Greece - Italy, Convention de Conciliation et Règlement judiciaire, 5 Novembre 1948, Article 16 (2 Revue Hellénique de Droit international 393 (1949));

Italy - Lebanon, Convention of Conciliation, 15 February 1949, Article 16 (155 BFSP 711);

Turkey - Italy, Traité d'Amitié, de Conciliation et de Règlement judiciaire, 24 March 1950, Article 18 (96 UNTS 216); and

Italy - Brazil, Agreement concerning Conciliation and Judicial Settlement, 24 November 1954, Article 16 (284 UNTS 344).

73. 111 LNTS 80. Much the same wording is in Article 17 of the Luxembourg - Switzerland Treaty of Conciliation, Judicial Settlement and Arbitration of 16 September 1929 (107 LNTS 30).

74. 114 LNTS 410. An identical formula may be found in the Greece - Turkey Treaty of Friendship, Neutrality, Conciliation and Arbitration of 30 October 1930, Article 21 (125 LNTS 18).

75. 74 LNTS 48. Provisions to the same effect are in the following clauses:

Portugal - Switzerland, Treaty of Conciliation, Judicial Settlement and Arbitration, 17 October 1928, Article 17 (96 LNTS 296);

Luxembourg - Portugal, Treaty of Conciliation, Arbitration and Judicial Settlement, 15 August 1929, Article 17 (115 LNTS 84);

Switzerland - Czechoslovakia, Treaty of Conciliation, Judicial Settlement and Arbitration, 20 September 1929, Article 18 (102 LNTS 132); and

Brazil - Venezuela, Treaty for the Pacific Settlement of Disputes, 30 March 1940, Article 21 (UN Systematic Survey 1130-1. The original Spanish text in 6 Tratados Públicos y Acuerdos Internacionales de Venezuela 599 (1942).).

76. 77 LNTS 100.

77. 30 Martens NRG-III 730.

78. 605 UNTS 216. An equitable measure of adjustment between a decision by the International Court of Justice or by an arbitral tribunal and a domestic judicial or other authoritative decision may be taken by the International Court of Justice or the arbitral tribunal under Article 33 of this treaty (Ibid. 226). The clause may be compared with a similar one in Article 12 of the European Fisheries Convention of 9 March 1964 (58 UNTS 72). See also the Israeli-Swiss Treaty of Conciliation, Judicial Settlement and Arbitration of 2 August 1965, Article 24, paragraph 2, and the Message of the Federal Council to the Federal Assembly of 23 November 1965 concerning the above treaty. 117 Feuille fédérale 206 and 148 (1965-III), as quoted in Rosenne, Shabtai, "Equitable Principles and the Compulsory Jurisdiction of International Tribunals" in Festschrift für Rudolf Bindschedler, 1980, p. 423.

79. 80 LNTS 25. This formula can be found in the following clauses:

Denmark - Spain, Treaty of Conciliation, Judicial Settlement and Arbitration, 14 March 1928, Article 19 (74 LNTS 102);

Austria - Spain, Treaty of Conciliation, Arbitration and Judicial Settlement, 11 June 1928, Article 19 (87 LNTS 402);

Spain - Luxembourg, Treaty of Conciliation, Judicial Settlement and Arbitration, 21 June 1928, Article 19 (109 LNTS 146);

Spain - Czechoslovakia, Treaty of Conciliation, Judicial Settlement and Arbitration, 16 November 1928, Article 19 (100 LNTS 322);

Iceland - Spain, Treaty of Conciliation, Judicial Settlement and Arbitration, 26 August 1929, Article 7 (104 LNTS 188); and in slightly different wordings

Spain - Norway, Treaty of Conciliation, Judicial Settlement and Arbitration, 27 December 1928, Article 17 (97 LNTS 348); and

Italy - Norway, Convention of Conciliation, Judicial Settlement and Arbitration, 17 June 1929, Article 22 (105 LNTS 172).

80. 142 LNTS 36.

81. 139 LNTS 102, 104.

82. Manning 260. Much the same provisions can be found in the following clauses:

Argentina - Uruguay, General Arbitration Treaty, 8 June 1899, Article 10 (Manning 264);

Argentina - Paraguay, General Arbitration Treaty, 6 November 1899, Article 10 (Manning 286);

Bolivia - Peru, General Arbitration Treaty, 21 November 1901, Article 8 (190 Parry 219);

Argentina - Bolivia, General Arbitration Treaty, 3 February 1902, Article 10 (Manning 318); and

Argentina - Chile, General Arbitration Treaty, 28 May 1902, Article 8 (Manning 330).

83. 2 Martens NRG-III 302. Identical or similar provisions may be found in:

Denmark - Portugal, Convention d'Arbitrage obligatoire, 20 March 1907, Article 2 (2 Martens NRG-III 304);

Costa Rica - Italy, General Arbitration Treaty, 8 January 1910, Article 3 (105 BFSP 590); and

Switzerland - Turkey, Treaty of Conciliation, Judicial Settlement and Arbitration, 9 December 1928, Article 8 (159 LNTS 224).

84. 167 LNTS 283.

85. 12 LNTS 285. The formula in an identical wording is given in:

Germany - Sweden, Treaty of Arbitration and Conciliation, 29 August 1924, Article 5 (42 LNTS 127);

Germany - Finland, Convention of Arbitration and Conciliation, 14 March 1925, Article 5 (43 LNTS 369);

Germany - Estonia, Convention of Arbitration and Conciliation, 10 August 1925, Article 5 (63 LNTS 126);

Germany - Netherlands, Convention of Arbitration and Conciliation, 20 May 1926, Article 4 (66 LNTS 121);

Germany - Denmark, Treaty of Arbitration and Conciliation, 2 June 1926, Article 4 (61 LNTS 340); and

Germany - Luxembourg, Treaty of Arbitration and Conciliation, 11 September 1929, Article 5 (118 LNTS 106).

86. 60 LNTS 305. The same or much the same formula, at least in so far as the second paragraph is concerned, may be found in the following clauses:

Denmark - Sweden, Convention for the Pacific Settlement of Disputes, 14 January 1926, Article 2 (51 LNTS 258);

Denmark - Norway, Convention for the Pacific Settlement of Disputes, 15 January 1926, Article 2 (60 LNTS 321);

Finland - Sweden, Convention for the Pacific Settlement of Disputes, 29 January 1926, Article 2 (49 LNTS 370);

Denmark - Finland, Convention for the Pacific Settlement of Disputes, 30 January 1926, Article 2 (51 LNTS 371);

Denmark - Haiti, Treaty of Arbitration and Conciliation, 5 April 1928, Article 4 (99 LNTS 22);

Denmark - Iceland, Convention regarding the Procedure to be Followed for the Settlement of Disputes, 27 June 1930, Article 2 (118 LNTS 129);

Iceland - Sweden, Convention regarding the Pacific Settlement of Disputes, 27 June 1930, Article 2 (127 LNTS 74); and

Iceland - Norway, Agreement regarding the Pacific Settlement of Disputes, 27 June 1930, Article 2 (126 LNTS 424).

87. Habicht 680. Identically worded or much the same provisions can be found in these clauses:

Italy - United States, Treaty of Arbitration, 19 April 1928, Article 1 (Ibid. 725);

Germany - United States, Treaty of Arbitration, 5 May 1928, Article 1 (Ibid. 739-40);

Finland - United States, Treaty of Arbitration, 7 June 1928, Article 1 (Ibid. 760);

Denmark - United States, Treaty of Arbitration, 14 June 1928, Article 1 (Ibid. 781);

Austria - United States, Treaty of Arbitration, 16 August 1928, Article 1 (Ibid. 817);

Czechoslovakia - United States, Treaty of Arbitration, 16 August 1928, Article 1 (89 LNTS 227);

Poland - United States, Treaty of Arbitration, 16 August 1928, Article 1 (Habicht 824);

Albania - United States, Treaty of Arbitration, 22 October 1928, Article 1 (Ibid. 847);

Sweden - United States, Treaty of Arbitration, 27 October 1928, Article 1 (Ibid. 859);

United States - Lithuania, Treaty of Arbitration, 14 November 1928, Article 1 (UN Systematic Survey 468);

United States - Bulgaria, Treaty of Arbitration, 21 January 1929, Article 1 (Ibid. 514);

United States - Kingdom of Serbs, Croats and Slovenes, Treaty of Arbitration, 21 January 1929, Article 1 (Ibid. 517);

United States - Ethiopia, Treaty of Arbitration, 26 January 1929, Article 1 (Ibid. 522);

United States - Hungary, Treaty of Arbitration, 26 January 1929, Article 1 (Ibid. 525);

United States - Norway, Treaty of Arbitration, 20 February 1929, Article 1 (Ibid. 533);

United States - Belgium, Treaty of Arbitration, 20 March 1929, Article 1 (Ibid. 541);

United States - Roumania, Treaty of Arbitration, 21 March 1929, Article 1 (Ibid. 544);

United States - Luxembourg, Treaty of Arbitration, 6 April 1929, Article 1 (Ibid. 555);

United States - Egypt, Treaty of Arbitration, 27 August 1929, Article 1 (Ibid. 642);

United States - Estonia, Treaty of Arbitration, 27 August 1929, Article 1 (Ibid. 644);

United States - Netherlands, Treaty of Arbitration, 13 January 1930, Article 1 (Ibid. 727);

United States - Latvia, Treaty of Arbitration, 14 January 1930, Article 1 (Ibid. 728);

United States - Iceland, Treaty of Arbitration, 15 May 1930, Article 1 (Ibid. 802-3);

United States - Greece, Treaty of Arbitration, 19 June 1930, Article 1 (Ibid. 804); and

United States - China, Treaty of Arbitration, 27 June 1930, Article 1 (Ibid. 825).

88. UN Systematic Survey 874.

89. 48 LNTS 180. An identical formula is in Article 16 of the Austria - Czechoslovakia Treaty of Conciliation, Arbitration and Judicial Settlement of 5 March 1926 (51 LNTS 356).

90. Provisions to the same effect may be found in the following clauses:

Poland - Switzerland, Treaty of Conciliation and Arbitration, 7 March 1925, Article 15 (50 LNTS 268);

France - Switzerland, Treaty of Conciliation, Arbitration and Judicial Settlement, 6 April 1925, Article 15 (147 LNTS 97);

Denmark - Poland, Treaty of Conciliation and Arbitration, 23 April 1926, Article 16 (61 LNTS 252);

Belgium - Switzerland, Treaty of Conciliation, Judicial Settlement and Arbitration, 5 February 1927, Article 18 (68 LNTS 54);

Colombia - Switzerland, Treaty of Conciliation, Arbitration and Judicial Settlement, 20 August 1927, Article 14 (Habicht 614);

Germany - Lithuania, Treaty of Arbitration and Conciliation, 29 January 1928, Article 5 (90 LNTS 247);

Germany - Turkey, Treaty of Arbitration and Conciliation, 16 May 1929, Article 5 (109 LNTS 465);

Czechoslovakia - Turkey, Convention of Judicial Settlement, Arbitration and Conciliation, 17 March 1931, Article 5 (133 LNTS 151); and

Greece - Poland, Treaty of Friendship, Conciliation and Arbitration, 4 January 1932, Articles 7 and 23 (131 LNTS 234, 240).

91. 54 LNTS 310. The other three Arbitration Treaties of Locarno of 16 October 1925 between Germany and Czechoslovakia, France and Poland have an identical clause in their respective Article 16 (Ibid. 348, 322, 334).

92. Identical or very much the same provisions are in:

France - Roumania, Convention for the Pacific Settlement of Disputes, 10 June 1926, Article 16 (58 LNTS 240);

Denmark - France, Arbitration Treaty, 5 July 1926, Article 17 (71 LNTS 462);

Denmark - Czechoslovakia, Arbitration Treaty, 30 November 1926, Article 17 (67 LNTS 112);

France - Luxembourg, Treaty of Conciliation, Arbitration and Judicial Settlement, 17 October 1927, Article 17 (Habicht 642);

France - Kingdom of the Serbs, Croats and Slovenes, Arbitration Convention, 11 November 1927, Article 16 (68 LNTS 388);

Spain - Hungary, Treaty of Conciliation, Judicial Settlement and Arbitration, 10 June 1929, Article 17 (101 LNTS 258-60);

Denmark - Latvia, Treaty of Arbitration, 28 February 1930, Article 17 (113 LNTS 34);

Bulgaria - Latvia, Treaty of Conciliation, Judicial Settlement and Arbitration, 23 May 1933, Article 17 (UN Systematic Survey 1034); and

Latvia - Czechoslovakia, Convention of Conciliation, Judicial Settlement and Arbitration, 11 October 1933, Article 17 (155 LNTS 195).

93. 102 LNTS 112. Identical provisions are included in the following clauses:

Netherlands - Czechoslovakia, Treaty of Judicial Settlement, Arbitration and Conciliation, 14 September 1929, Article 4 (107 LNTS 204);

Luxembourg - Netherlands, Treaty of Judicial Settlement, Arbitration and Conciliation, 17 September 1929, Article 4 (107 LNTS 38);

Netherlands - Roumania, Treaty of Judicial Settlement, Arbitration and Conciliation, 22 January 1930, Article 4 (112 LNTS 124);

Netherlands - Poland, Treaty of Judicial Settlement, Arbitration and Conciliation, 12 April 1930, Article 4 (113 LNTS 68);

Belgium - Roumania, Treaty of Judicial Settlement, Arbitration and Conciliation, 8 July 1930, Article 4 (128 LNTS 406);

Netherlands - Turkey, Treaty of Judicial Settlement, Arbitration and Conciliation, 16 April 1932, Article 4 (143 LNTS 237); and

Norway - Netherlands, Treaty of Judicial Settlement, Arbitration and Conciliation, 23 March 1933, Article 4 (146 LNTS 294). A similar stipulation in Japan - Netherlands, Treaty of Judicial Settlement, Arbitration and Conciliation, 19 April 1933, Article 3 (163 LNTS 354).

94. 101 LNTS 336. An alternative means of conforming to the provisions in the Statute of the Permanent Court of International Justice is laid down in Article 15 of the Polish - Swedish Treaty of Conciliation and Arbitration of 3 November 1925 (62 LNTS 270).

95. 60 LNTS 357-9.

96. 34 LNTS 394. The other similar clauses are in the following:
Netherlands - Yugoslavia, Treaty of Judicial Settlement, Arbitration and Conciliation, 11 March 1931, Article 6 (129 LNTS 92);

Netherlands - Venezuela, Treaty of Arbitration, Judicial Settlement and Conciliation, 5 April 1933, Article 6 (144 LNTS 356);

Denmark - Venezuela, Treaty of Arbitration, Judicial Settlement and Conciliation, 19 December 1933, Article 6 (158 LNTS 252-4);

Brazil - Uruguay, Treaty of Conciliation and Obligatory Arbitration, 22 August 1934, Article 17 (UN Systematic Survey 1077); and

Norway - Venezuela, Treaty of Arbitration, Judicial Settlement and Conciliation, 13 May 1935, Article 6 (167 LNTS 422).

97. 522 UNTS 240. Identical provisions are in the following clauses:

Belgo - Luxembourgian Economic Union - Tunisia, Convention concerning the Encouragement of Capital Investment and the Protection of Property, 15 July 1964, Article 4 (561 UNTS 302);

Netherlands - Ivory Coast, Agreement on Economic and Technical Co-operation, 26 April 1965, Article 12 (634 UNTS 90);

Belgo - Luxembourgian Economic Union - Morocco, Convention concerning the Encouragement of Capital Investment and the Protection of Property, 28 April 1965, Article 5 (620 UNTS 176);

Netherlands - Senegal, Agreement on Economic and Technical Co-operation, 12 June 1965, Article 6, paragraph 5 (602 UNTS 236); and

Netherlands - Cameroon, Agreement on Economic and Technical Co-operation, 6 July 1965, Article 12, paragraph 5 (571 UNTS 70).

98. 615 UNTS 402.

99. 57 AJIL 505 (1963).

100. The word "referee", not amiable compositeur, is used in the English text which is official, but the official Spanish text has "amigable componedor" (70 UNTS 136, 137). The same provision is in Article 7 of the Paraguay - Spain Treaty of Peace and Amity of 12 October 1949 (155 BFSP 827).

101. 85 UNTS 350.

102. This is the text of the relevant part of the Danish - German Agreement (ST/LEG/SER.B/16, p. 424). A slightly different English version is in the Dutch - German Agreement (Ibid., p. 419).

103. 540 UNTS 36-7.

104. Ibid. 17.

105. Ibid. 33.

106. Ibid. 35.

107. Ibid. 55.

108. 8 De Clercq 34. It is worth noting that the mixed commission was to act basically "dans un esprit d'équité".

109. Ibid. 185. Also worth noting is the staff officers proceeding to the demarcation of the boundary line "soit pour établir une démarcation convenable, soit pour favoriser, des deux côtés, les propriétaires frontaliers dans des vues commune d'équité". (Emphasis added)

110. Quoted in Jones, St. B., Boundary-Making: A Handbook for Statesmen, Treaty Editors and Boundary Commissions, 1945, p. 59.

111. Journal Officiel de la République Française, 21 novembre 1947, p.11489, as quoted in Bardonnnet, D., "Equité et Frontières terrestres" in Mélanges offerts à Paul Reuter - Le droit international: Unité et Diversité, 1981, p. 49.

112. 30 LNTS 66. Further, Clause 1 provides in part that "Subject to any decision of the arbitrators to the contrary, the procedure shall be governed by the provisions of the Convention of The Hague of October 18, 1907 for the Pacific Settlement of International Disputes." (Ibid. 64)

The following may also be mentioned as examples falling under the heading "consideration of relevant circumstances":

Guatemala - El Salvador, Treaty for the Delimitation of the Boundary, 9 April 1938, preambular paragraph 4:

"That the Joint Commission proceeded ... and at points where the frontiers were not clearly defined, establishing by consulting old titles, the right of possession claimed by one or the other brother country, and confirming boundary-stones or points acknowledged to be undisputed and traditional, adopting wherever possible the median natural line, and taking into consideration old-established estate interests in the territory, and being wholly governed, wherever doubt arose as to the precise line to be adopted, by a spirit of absolute equality and justice. ..."

(189 LNTS 289)

Act XVI of the Joint Frontier Commission, dated 5 December 1937, which, in accordance with Article 3 of the frontier delimitation treaty, is to be regarded as an integral part of the said treaty, and which includes Act XV recording the proceedings of the Commission on 16 October 1937:

"V. Where an estate is situated within both national jurisdictions, the frontier shall not be so drawn as to prejudice the interests of either country, but shall continue to divide the estate, which shall thus belong to both jurisdictions.

VI. Where two recognized boundary-marks have to be joined by a dividing line, consideration shall be had to the natural configuration of the ground, and all necessary adjustments made so that neither Party benefits at the expense of the other."

(Ibid. 303)

France - Luxembourg, Accord portant rectification de frontière, 16 juillet 1963, which effected an exchange of 2,233 square metres in order to establish "un tracé de frontière rationnel, supprimant toutes les anomalies et répondant aux conditions locales". (645 UNTS 38)

113. ST/LEG/SER.B/18, p. 43.

114. United States Department of State, Bureau of Intelligence and Research, Office of the Geographer, 89 Limits in the Seas 1, 2. A similar consideration of two islands, one Iranian and the other Saudi Arabian, as exceptional was given in the Iran - Saudi Arabia Agreement concerning the Sovereignty over the Islands of Al-'Arabiyah and Farsi and the Delimitation of the Boundary Line Separating the Submarine Areas of 24 October 1968, Article 3 (696 UNTS 214; a comment in 24 Limits in the Seas 4).

115. 97 Parry 385.

116. Nweihed, K. G., "EZ (Uneasy) Delimitation in the Semi-enclosed Caribbean Sea: Recent Agreements Between Venezuela and Her Neighbors", 8 Ocean Development and International Law Journal 25 (1980).

117. 97 Parry 114, 119 Parry 135.

118. Article 3 of the Costa Rica - Nicaragua Convention of Peace (Manning 32), and Articles 94 and 95 of the Treaty of Peace with Turkey (28 LNTS 80).

119. J. Dumont, 6 Corps universel diplomatique 85, as quoted in Schwarzenberger, G., The Dynamics of International Law, 1976, p.62.
120. 48 LNTS 266. See also the Convention between Ecuador and Peru of 15 December 1894, Article 1 of which runs in part: "... conciliandos de modo que la línea frontera este fundada en el derecho y en la equidad." La Fontaine 324.
121. Manning 159.
122. Ibid. 160. In a subsequent complementary protocol between the same parties for carrying out the arbitral and other provisions of the boundary convention of April 20, 1886, signed at La Paz on 24 April 1886, Article 2 provides in part that "the four ministers shall be constituted into an international commission to deliberate and determine by majority vote the delimitation found to be just or proper for both parties." (Manning 162)
123. 513 UNTS 160. Mentioning ex aequo et bono in the parenthesis after the phrase "in accordance with equity" is an interesting assimilation of the two phrases.
124. The Iran - Saudi Arabia agreement in 696 UNTS 212; the Iran - Qatar agreement in 787 UNTS 172; the Iran - Bahrain agreement in 826 UNTS 234; and the Iran - United Arab Emirates agreement in Conforti, B. & G. Francalanci, Atlante dei Confini Sottomarini, 1979, p.119. Another similar provision can be found in the Haïti-San Domingo Traité de Paix, d'Amitié, de Commerce, de Navigation et d'Extradition of 9 November 1874, Article 4 of which reads: "Les hautes parties contractantes s'engagent formellement à établir, de la manière la plus conforme à l'équité et aux intérêts réciproques des deux peuples, les lignes qui séparent leurs possessions actuelles." 27 Martens NRG-II 4.
125. 753 UNTS 192. Much the same wording is in Article 8 of the Agreement of 13 November 1970 concerning the settlement of outstanding financial problems between Belgium and Luxembourg on the one hand and Roumania on the other (801 UNTS 230).
126. The Netherlands - Indonesia agreement, Article 22, paragraph 5 (799 UNTS 28); the Netherlands - Sudan agreement, Article 17, paragraph 5 (829 UNTS 66); and the Netherlands - Thailand agreement, Article 12, paragraph 5 (866 UNTS 60).
127. 620 UNTS 204.
128. 509 UNTS 102. In a companion "Frontier Treaty" or the Treaty concerning the course of the common frontier, the boundary waters, real property situated near the frontier, traffic crossing the frontier on land and via inland waters, and other frontier questions of the same date, Article 71, paragraph 3 provides: "The umpire shall first discuss the difference with the two Governments with a view to bringing about a settlement. If he considers his efforts to have failed he shall inform the two Governments accordingly." (508 UNTS 200) Further in a Supplementary Agreement of 14 May 1962 to the Ems-Dollard Treaty of 8 April 1960, Article 10, paragraph 6, refers to equity: "The arbitral tribunal shall lay down a settlement binding upon the Contracting Parties and the affected concessionaires with respect to all questions of law or discretion which are at issue. In

its decision, the arbitral tribunal may also take into account considerations of equity." (509 UNTS 148)

129. ST/LEG/SER.B/16, p. 403.

130. A/CONF.39/27, p. 16.

131. 41 LNTS 274-5. An identically worded clause is included in the following:

United States - Sweden, Convention respecting the Regulation of the Liquor Traffic, 22 May 1924, Article 4 (29 LNTS 424-5);

United States - Norway, Convention respecting the Regulation of the Liquor Traffic, 24 May 1924, Article 4 (26 LNTS 47);

United States - Denmark, Convention respecting the Regulation of the Liquor Traffic, 29 May 1924, Article 4 (27 LNTS 365);

United States - France, Convention for the Prevention of Smuggling of Intoxicating Liquors, 30 June 1924, Article 4 (601 LNTS 419);

United States - Netherlands, Convention respecting the Regulation of the Liquor Traffic, 21 August 1924, Article 4 (33 LNTS 437);

United States - Spain, Convention for the Prevention of Smuggling of Intoxicating Liquors, 10 February 1926, Article 6 (67 LNTS 135); and

United States - Cuba, Convention for the Prevention of Smuggling Operations between Their Respective Territories, 4 March 1926, Article 4 (61 LNTS 372-3).

Substantially the same provision, though differently worded, is in the Netherlands - Poland Treaty of Commerce and Navigation of 30 May 1924, Protocole de clôture I (Procédure d'arbitrage), paragraph 2: "Au cas où le différend sera soumis à la Cour permanente d'Arbitrage, les stipulations de la Convention de La Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux seront applicables. ..." (34 LNTS 26)

132. 181 UNTS 86-88. Virtually the same provision may be found in Article 18, paragraph B (2), of the Egypt - Yugoslavia Agreement concerning Regular Air Transport Services of 20 February 1955 (255 UNTS 228).

133. 201 LNTS 128.

134. 8 UNTS 226. An identical wording may be seen in Article 16 of the Hungary - Union of Soviet Socialist Republics Treaty of Commerce and Navigation of 15 July 1947 (216 UNTS 276).

135. 14 LNTS 279.

136. 4 UKTS 162 (1919, Cmd. 153). The same clause is in the following three treaties:

Allied & Associated Powers - Austria, Treaty of Peace, 10 September 1919, Article 256, Annex, paragraph 2 (11 UKTS 85 (1919, Cmd. 400));

Allied & Associated Powers - Bulgaria, Treaty of Peace, 27 November 1919, Article 188, Annex, paragraph 2 (5 UKTS 60 (1920, Cmd. 522)); and

Allied & Associated Powers - Hungary, Treaty of Peace, 4 June 1920, Article 239, Annex, paragraph 2 (10 UKTS 81 (1920, Cmd. 896)).

Much the same provision is in Article 12 of the Anglo-American Treaty relating to Boundary Waters and Questions Arising between Canada and the United States of 11 January 1909, which reads in part: "... The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, ..." (208 Parry 220)

137. 7 LNTS 95. A similar provision is in Article 7 of the Yugoslav - Greek Agreement concerning Hydro-economic Questions of 18 June 1959 (363 UNTS 138). Provisions to the same effect may be found in Article 9, paragraph 3, of the Denmark - Sudan Agreement on Air Services between and beyond Their Respective Territories of 11 May 1959 (445 UNTS 114), and Article 10 of the French - Swiss Convention concerning the Extension into French Territory of the Site of the European Organization for Nuclear Research of 13 September 1965 (689 UNTS 68), whose basis of decision goes back to Article 15 of the French - Swiss Treaty of Conciliation and Arbitration of 6 April 1925 (147 LNTS 97).

138. 866 UNTS 146. Identical or similar provisions are in the following clauses:

France - Khmer Republic, Air Transport Agreement, 15 January 1964, Article 9, paragraph 3 (796 UNTS 32);

Lebanon - Senegal, Air Transport Agreement, 27 December 1966, Article 9, paragraph 3 (794 UNTS 248);

Philippines - Republic of Korea, Air Transport Agreement, 22 July 1969, Article 12, paragraph 3 (710 UNTS 142);

Netherlands - Gabon, Air Transport Agreement, 14 October 1969, Article 8, paragraph 3 (796 UNTS 96); and

Austria - France, Convention générale sur la sécurité sociale, 28 mai 1971, Article 38, paragraph 3 (856 UNTS 140).

139. The Articles of Agreement of the International Development Association, approved on 26 January 1960 for submission to Governments by the Executive Directors of the International Bank for Reconstruction and Development, Article 10, paragraph (d) in part provides: "The umpire (i.e. of a tribunal of three arbitrators) shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto." (439 UNTS 288) The sentence "The arbitral procedure shall be fixed by the tribunal" is included in the following clauses:

International Atomic Energy Agency - German Democratic Republic, Agreement for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, 7 March 1972, Article 22 (895 UNTS 20);

International Atomic Energy Agency - Nepal, Agreement for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, 24 March and 22 June 1972, Article 22 (Ibid. 96);

International Atomic Energy Agency - Cyprus, Agreement for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, 26 June 1972, Article 22 (Ibid. 250);

International Atomic Energy Agency - Holy See, Agreement for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, 26 June 1972, Article 22 (Ibid. 173-4); and

International Atomic Energy Agency - Mongolia, Agreement for the Application of Safeguards in Connection with the Treaty on the Non-

Proliferation of Nuclear Weapons, 17 July and 9 August 1972, Article 22 (Ibid. 364).

Much the same formula is in Article 20 of the France - European Organization for Nuclear Research Agreement concerning the Legal Status of the Said Organization in France of 16 June 1972 (871 UNTS 222).

140. 793 UNTS 224.

141. 484 UNTS 374.

142. 73 Parry 133-4. The Arbitral Convention of 2 April 1918 between France and the Netherlands concerning the indemnity for requisition of potatoes likewise provides for equity as the basis of decision (Stuyt No. 321a).

143. La Fontaine 647. Another guide for decision is in Article 1 which provides: "As the conciliatory arbitrators and amiables compositeurs shall be nominated Sres. Jenaro Larrea and Francisco Andrade Marín so that they may resolve the claim from the Salesian priests, after hearing both parties." (Ibid.)

144. Ralston-Doyle 2. In addition to the traditional formula of the Commissioners and the Umpire taking solemn oath "carefully to examine and impartially decide, according to justice ...", "absolute equity" is provided as the principal basis of decision. This seems to be further re-inforced by the phrase "without regard to objections of technical nature, or of the provisions of local legislation". The same or much the same provisions may be found in the following:

Mexico - Venezuela, Protocol of an Agreement for Submission to Arbitration of All Unsettled Claims of Mexican Citizens, 26 February 1903, Article 1 (Ibid. 876);

France - Venezuela, Protocol, 27 February 1903, Article 1 (Ibid. 484);

Netherlands - Venezuela, Protocol of an Agreement for Submission to Arbitration and Payment of All Unsettled Claims of the Government and Subjects of the Netherlands, 28 February 1903, Article 1 (Ibid. 890);

Belgium - Venezuela, Protocol of an Agreement for Submission to Arbitration and Payment of All Unsettled Claims of the Government and Subjects of Belgium, 7 March 1903, Article 1 (Ibid. 262);

Sweden - Norway - Venezuela, Protocol of an Agreement for Submission to Arbitration of All Unsettled Claims of Citizens of Sweden and Norway, 10 March 1903, Article 1 (Ibid. 946);

Spain - Venezuela, Protocol of an Agreement for Submission to Arbitration of All Unsettled Claims of Spanish Subjects, 2 April 1903, Article 1 (Ibid. 918);

Great Britain - Venezuela, Agreement for the Decision of the Claims by a Mixed Commission, 7 May 1903, Paragraph 6 (96 BFSP 104);

Germany - Venezuela, Agreement, 7 May 1903, Article 2 (Ralston-Doyle 516); and

Italy - Venezuela, Agreement, 7 May 1903, Article 2 (Ibid. 646).

145. 52 Parry 251. The formula of "justice and equity" may be found, with or without additional guides for decision, in the following clauses:

Austria - Baden - Bavaria - France - Great Britain - Hesse - Darmstadt - Nassau - the Netherlands - Prussia, Articles concerning the Navigation of the Rhine, 24 March 1815, Article 28, paragraph 3 (64 Parry 23);

Great Britain - United States, Convention for Determining the Indemnity Due under Article 1, Treaty of Ghent, 12 July 1822, Article 1 (72 Parry 427);

Great Britain - United States, Convention for the Settlement of Private Claims by a Mixed Commission, 8 February 1853, Article 1 (9 Hertslet 767);

United States - New Granada, Claims Convention, 10 September 1857, Article 1 (1 Malloy 320);

Great Britain - Brazil, Convention for the Settlement of Outstanding Private Claims by a Mixed Commission, 2 June 1858, Article 1 (10 Hertslet 725-6);

Great Britain - United States, Treaty for the Settlement of the Claims of the Hudson's Bay & Puget's Sound Agricultural Companies, 1 July 1863, Article 2 (12 Hertslet 933);

United States - Colombia, Convention of Claims, 10 February 1864, Article 1 (1 Malloy 322);

Great Britain - Mexico, Convention for the Investigation and Settlement of British Claims by a Mixed Commission, 26 June 1866, Article 1 (12 Hertslet 656);

United States - Peru, Convention for the Settlement of Claims, 4 December 1868, Article 1 (2 Malloy 1412);

Great Britain - United States, Treaty for the Amicable Settlement of All Causes of Difference between the Two Countries, 8 May 1871, Article 12 (13 Hertslet 976-7), Article 23 (Ibid. 980);

France - Guatemala, Protocole d'arbitrage pour le règlement de la réclamation Bezault et de la contre-réclamation du Guatemala, 25 April 1904, Article 3 (102 BFSP 607);

United States - Venezuela, Agreement for the Decision and Adjustment of Certain Claims, 13 February 1909, Article 5 (4 Martens NRG-III 76);

Great Britain - Portugal, Compromis of Arbitration concerning the Claims of Major Campbell, 1 August 1930, Preambular paragraph 4 (23 Martens NRG-III 723); and

Germany - United States, Agreement Providing for the Determination of the Amount of the Claims against Germany under the Treaty of August 25, 1921, 10 August 1922, Administrative Decision No. II of 1 November 1923 (18 AJIL 178-9 (1924)).

146. 17 Martens NRG-III 302. Provisions to the same effect are in: Spain - Mexico, Convention, 25 November 1925, Article 2 (Feller 522);

Great Britain - Mexico, Convention for the Settlement of British Claims in Mexico Arising from Revolutionary Acts, 19 November 1926, Article 2 (23 Martens NRG-III 10); and

Italy - Mexico, Convention for the Settlement of Italian Claims Arising from Revolutionary Acts in Mexico, 13 January 1927, Article 2 (Feller 504).

147. 17 Martens NRG-III 303. The following clauses also have provisions to the same effect:

Spain - Mexico, Convention, 25 November 1925, Article 6 (Feller 523);

Great Britain - Mexico, Convention for the Settlement of British Claims in Mexico Arising from Revolutionary Acts, 19 November 1926,

Article 6 (23 Martens NRG-III 14); and

Italy - Mexico, Convention for the Settlement of Italian Claims Arising from Revolutionary Acts in Mexico, 13 January 1927, Article 6 (Feller 507).

148. France - Mexico, Convention respecting the Settlement of French Claims Arising out of Revolutionary Acts in Mexico, 25 September 1924, Article 2 (122 BFSP 591), and Germany - Mexico, Convention relating to Compensation to German Nations for Damage during Revolutionary Disturbances in Mexico, 16 March 1925, Article 2 (Ibid. 687). Article 6 of the French - Mexican Convention and Article 7 of the German - Mexican Convention have much the same provisions as those of Article 6 in the American, Spanish, British and Italian Conventions with Mexico seen supra note 147 (122 BFSP 593 and 689).

149. 12 Hertslet 1205. This formula is also found in Article 7 of the Japanese - British Protocol for Submitting to Arbitration Certain Questions as to the Interpretation of Treaties with Japan with Regard to Lease Held in Perpetuity of 28 August 1902 (23 Hertslet 826).

150. 7 LNTS 280.

151. Ibid. 286.

152. 48 BFSP 105.

153. These expressions may be found in the following:

Spain - United States, Collective Letter to Submit to Arbitration the Indemnification to the owner of the "Masonic", 28 February 1885, Paragraph 2 (La Fontaine 281);

Great Britain & United States - Portugal, Protocol to Submit to Arbitration the Indemnity Resulting from the Rescission of the Concession of the Lorenzo Marques Railway, 13 June 1891, Article 3 (La Fontaine 398);

Great Britain - Transvaal, Award of the Arbitrator with Reference to the Matters in Controversy, relative to Article 14 of the Convention of London of 1884, Pronounced to Bloemfontein, 2 April 1895, (Ibid. 459-60);

Great Britain - United States, Convention for the Submission to Arbitration of British Claims in Connection with the Behring Sea Seal Fishery, 8 February 1896, Article 2 (20 Hertslet 936);

Great Britain - Belgium, Convention Referring to Arbitration the Case of Mr. Ben Tillett, 19 March 1898, Preamble (21 Hertslet 271);

Brazil - United States, Protocol of an Agreement Submitting to Arbitration a Claim of Citizens of the Latter against the Government of the Former, 6 September 1902, Article 1 (Manning 332-3);

Peru - United States, Protocol for the Submission to Arbitration of the Landreau Claim against Peru, 21 May 1921, Article 1 (6 LNTS 173); and

Canada - United States compromis of 25 March 1965 in the Gut Dam Arbitration, Article 2, paragraphs 2 and 3 (607 UNTS 146).

154. La Fontaine 120.

155. For similar provisions, see the Argentine - British Convention (48 BFSP 41-2), and the Argentine - Sardinian Convention (49 BFSP 479).

156. 6 Hertslet 727. But see Article 11, which runs in part: "if the Commission can arrive at a moral conviction of the justice or of the injustice of a claim, they may, notwithstanding the absence or incompleteness of vouchers, decide such claim according to principles of equity, keeping in view the letter and the spirit of such contracts as may apply to the case." (Ibid. 728-9).

157. 17-1 Martens NRG-I 257.

158. 126 Parry 473. For the Spanish text, see ibid. A similar stipulation may be found in Article 1 of the Chile - Peru Protocol for the Liquidation of the Accounts of the Expenditures on Account of the Allied Squadron during the War with Spain of 27 September 1871 (3 Lapradelle-Politis 536).

159. La Fontaine 221-2.

160. Ibid. 579.

161. 32 Martens NRG-II 85-6. Provisions granting the arbitrator or arbitrators or tribunal the powers of an amiable compositeur may also be found in the following clauses:

United States - Chile, Protocol of Submission of the Alsop claim, 1 December 1909, paragraph 2 (5 AJIL 1080(1911));

Morocco - Netherlands, Décret chérifien, 9 January 1914, Article 2 (90 JORF 3047, as quoted in Stuyt No. 316);

Société Européenne d'Etudes et d'Entreprise - Yugoslavia, 3 January 1932, Article 17 (ILR 761 (1957)); and

Belgium - Luxembourg - Netherlands, Protocol établi lors des conversations ministérielles, 21 October 1950, Article 4, paragraph 3 (12 RIAA 322).

162. 17-1 Martens NRG-I 244. The ex aequo et bono formula is in:

Brazil - Italy, Protocollo concernente i reclami italiani, 12 February 1896, Article 4 (La Fontaine 519);

Brazil - Italy, Protocollo per la soluzione dei reclami italiani originati da requisizioni, 12 February 1896, Article 1 (Ibid. 527);

Great Britain - Panama, Convention (on the "James Pugh" case), 15 October 1932, Article 3 (3 RIAA 1441-2); and

France - Switzerland, Règlement concernant les importations en Suisse des produits des Zones franches, 1 December 1933, Article 8 (Ibid. 1474).

163. 97 BFSP 692.

164. 16 Martens NR 626.

165. 11 UKTS 73 (1920, Cmd. 964).

166. 11 Martens NRG-III 614. Article 339 bore upon the Czechoslovak - German cessions. For Article 357 bearing on the French - German cessions, see ibid. 622-3. For similar provisions, see the Following: Article 300, Treaty of Saint German with Austria, 10 September 1919 (11 UKTS 95 (1919, Cmd. 400)); Article 284, Treaty of Trianon with Hungary, 4 June 1920 (10 UKTS 92 (1920, Cmd. 896)); and Article 228, Treaty of Neuilly with Bulgaria, 27 November 1919 (5 UKTS 70 (1920, Cmd. 522)).

167. 61 BFSP 102. A provision in nearly the same wording can be found in Article 2 of the Colombia - United States Convention for the Arbitration of the Case of the "Montijo" of 17 August 1874 (5 Moore 4698).
168. Manning 141.
169. Ibid. 142.
170. 5 Moore 4700.
171. 52 Parry 252.
172. Ibid.
173. Ibid. 251.
174. A justice-equity-law formula may be found in the following:
 Spain - United States, Treaty of Friendship, Boundaries, Commerce and Navigation, 27 October 1795, Article 21 (53 Parry 29);
 Mexico - United States, Convention in Execution of Article 6 of the Convention of 30 January 1843, 20 November 1843, Article 1 (14 Martens NRG-I 39);
 United States - Costa Rica, Convention relative to the Claims of United States Citizens, 2 July 1860, Article 2 (1 Malloy 347);
 United States - Peru, Convention of Claims, 12 January 1863, Article 3 (54 Hertslet 1125);
 United States - Mexico, Convention for the Adjustment of Claims, 4 July 1868, Article 1 (1 Malloy 1129);
 United States - France, Convention relative to the Settlement of Certain Claims of the Citizens of Either Country against the Other, 15 January 1880, Article 4 (6 Martens NRG-II 494);
 Guatemala - Mexico, Convention for Claims, 26 January 1888, Article 4 (La Fontaine 325-6);
 United States - Venezuela, Convention to Submit to Arbitration the Claims of the Venezuela Steam Transportation Company, 20 January 1892, Article 3 (22 Martens NRG-II 264);
 United States - Cuba, Convention for Settling the Mutual Claims by Arbitration, 7 August 1892, Article 4 (Ibid. 340);
 Great Britain - Haïti, Protocol, 27 February 1904, Article 2 (1904 Descamps-Renault 945, as quoted in Stuyt No. 269);
 Mexico - United States, Convention for the Settlement of Claims by the Citizens of Each Country against the Other, 8 September 1923, Article 2 (17 Martens NRG-III 294-5);
 Panama - United States, Claims Convention, 28 July 1926, Article 2 (25 Martens NRG-III 7-8);
 United States Act of Congress for the United States - Mexico Claims case, 10 April 1935, Section 3, paragraph (a) (Feller 540); and
 Ecuador - United States, Agreement, Article 1 ((1913) US Foreign Relations 502). In the Mexico - United States Convention of 8 September 1923 and the Panama - United States Convention of 28 July 1926, Article 5 has identically-worded equitable provisions: "The high contracting parties, being desirous of effecting an equitable settlement of the claims of their respective citizens, thereby affording them just and adequate compensation for their losses or damage, agree that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a

condition precedent to the validity or allowance of any claim." (17 Martens NRG-III 296; 25 Martens NRG-III 9).

175. 1 Malloy 432. Much the same provisions may be found in Article 1 of the United States - Venezuela Convention of Claims of 25 April 1866 (2 Malloy 1856) and Article 3 of the United States - Venezuela Convention respecting the Claims of Citizens of the United States against Venezuela under the Treaty of April 25, 1866, 5 December 1885 (76 BFSP 951).

176. Stuyt No. 225.

177. 32 Martens NRG-II 76.

178. 21 Hartslet 1181. Other examples of "law and/or equity" provisions may be found in these clauses:

Italy - Colombia, Compromis d'arbitrage concernant l'affaire Cerruti, 28 October 1909, Article 6 (11 RIAA 382);

Great Britain - United States, Agreement for the Settlement of Certain Pecuniary Claims, 18 August 1910, Article 7 (6 Martens NRG-III 363);

Great Britain, France & Spain - Portugal, Agreement to Submit to Arbitration the Question of Religious Properties Seized in Portugal, 31 July 1913, Article 3 (20 Martens NRG-III 363);

France - Haïti, Protocol of Arbitration for the Settlement of Claims of French Citizens, 10 September 1913, Article 3 (8 Martens NRG-III 346);

France - Turkey, Compromis d'arbitrage afin de régler les réclamations formulées auprès de la Porte Ottomane par les ressortissants français, 18 December 1913, Preamble (8 Martens NRG-III 721);

Norway - United States, Agreement for the Submission to Arbitration of Certain Claims of Norwegian Subjects ("Norwegian shipowners claims"), 30 June 1921, Article 1 (114 BFSP 896); and

United States - Egypt, Protocol of Agreement for the Settlement by Arbitration of the Claims of United States Citizen George J. Salem, 20 January 1931, Article 3 (26 Martens NRG-III 68).

179. 18 UKTS 3 (1937, Cmd. 5444).

180. 20 ILM 232 (1981).

181. Oellers-Frahm - Wühler 888.

182. 95 BFSP 974.

183. 138 UNTS 186. Similar provisions are in the Rules of Procedure of the French - German Mixed Arbitral Tribunal of 2 April 1920, Articles 5 and 98 (Oellers-Frahm - Wühler 707, 719), and in the Resolution of the same Tribunal of 12 April 1921, paragraph IX (Ibid. 720).

184. 12 RIAA 163.

185. 22 Martens NRG-II 101. Article 2 of the British - American Treaty for Submitting to Arbitration the Questions relating to the Seal Fisheries in Behring's Sea of 29 February 1892 has a similar provision (19 Hertslet 891-2).

186. 15 RIAA 485.
187. Ibid. 487.
188. 168 Parry 266.
189. 52 Parry 249.
190. 63 Parry 424.
191. 7 ILM 637 (1968).
192. 3 RIAA 1819.
193. Ibid. 1820.
194. 20 Martens NRG-I 2. "Equitable solution", "equitable judgment", "just award", "equitable delimitation", etc. may be found in the following clauses:
Great Britain - Portugal, Protocol of Conference Agreeing to Refer to Arbitration Their Respective Claims to the Island of Bulama, 13 January 1869, Article 9 (13 Hertslet 690);
Orange Free State - Transvaal, Compromis, 30 October 1869, (Award) (2 Lapradelle-Politis 578);
Barolong, Batlaping & Griquas - Transvaal, Compromis, 1 March 1871, Article 10 (47 British Parliamentary Papers 150 (1871, C.459));
Great Britain - Portugal, Protocol of Conference to Refer to Arbitration the Respective Claims in Delagoa Bay, 25 September 1872, Article 9 (13 Hertslet 710);
Ecuador - Peru, Convention for Submitting to Arbitration the Question of the Boundary, 1 August 1887, Article 1 (78 BFSP 47);
Colombia - Ecuador - Peru, Supplemental Arbitration Convention to the Garcia - Herrera Treaty of 2 May 1890, 15 December 1894, Article 1 (La Fontaine 324);
Honduras - Nicaragua, Bonilla - Gamez Treaty, 7 October 1894, Articles 1 and 2, paragraph 5 (11 RIAA 107); and
Great Britain - France, Declaration with Regard to the Kingdom of Siam and Other Matters, 15 January 1896, Article 5 (20 Hertslet 306).
195. Manning 117.
196. 100 BFSP 803.
197. Ibid. 804.
198. 2 AJIL Off. Doc. 287 (1908).
199. 112 Parry 33. An identical wording, in so far as the relevant provisions are concerned, is included in the following clauses:
Great Britain - Guatemala, Convention relative to the Boundary of British Honduras, 30 April 1859, Article 3 (11 Hertslet 346);
Great Britain - Honduras, Treaty respecting the Bay Islands, the Mosquito Indians, and the Rights and Claims of British Subjects, 28 November 1859, Article 6 (Ibid. 369); and
Great Britain - Nicaragua, Treaty relative to the Mosquito Indians, and the Rights and Claims of British Subjects, 28 January 1860, Article 10 (Ibid. 449).

200. La Fontaine 505. Similar provisions are in Articles 6 and 7 of the Guatemala - Honduras Convention of Boundary of 1 March 1895 (87 BFSP 532).

201. 20 Hartslet 945-6. "Law and equity" formulas may be found in Article 1 of the Colombia - Peru Treaty of 6 May 1904 (1904 Descamps-Renault 1031, as quoted in Stuyt No. 271), and Article 1 of the Colombia - Peru Treaty of 12 September 1905 (1905 Descamps-Renault 853, as quoted in Stuyt No. 281).

202. 201 UNTS 328.

203. 26 Hertslet 1092.

204. 217 Parry 299.

205. Ibid. 291.

206. 64 Parry 390.

207. La Fontaine 288. In the Costa Rican - Panamanian Convention for the Settlement by Arbitration of the Boundary Dispute of 17 March 1910, Article 1 provides in part: "... the arbitrator will take into account all the facts, circumstances, and considerations which may have a bearing upon the case" (6 AJIL Off. Doc. 2 (1912)).

208. Latvia - Lithuania Convention, Article 3 (2 LNTS 235); and Estonia - Latvia Convention, Article 4 (Ibid. 189).

209. ICJ Reports, 1982, p. 21, para 2.

210. 102 BFSP 732. Article 2, paragraph 6, of the Secret Annex to the Treaty of Amity and Alliance of 29 February 1912 between Bulgaria and Servia provides for the "frontière définitive" to be found by the arbitrator best to meet the "droits et intérêts des deux parties" (8 Martens NRG-III 6).

211. (1892) US Foreign Relations 2. A similar provision may be seen in a Declaration relative to the Manica Boundary Arbitration between Great Britain and Portugal of 7 January 1895 (181 Parry 16).

212. ICJ Reports, 1982, p. 23, para. 4.

213. ICJ Reports, 1969, p. 53, para. 101(C)(1).

Notes: Chapter III

1. ICJ Reports, 1978, pp. 35-36, para. 85.

2. 2 RIAA 841.

3. Ibid. The pleadings of the case suggest that the Arbitrator's understanding of his latitude in procedural matters coincided with that of the Netherlands Government, rather than that of the United States Government which, based on the common lawyer's view, did not allow him a wide latitude. In a reply to the International Law Commission's questionnaire on "Arbitral Procedure", communicated by the Secretary-General in his letter dated 11 July 1949 (LEG 291/01/YLL) to all Governments of Members of the United Nations, the Netherlands Government discusses "Questions of Procedure in the Palmas or Miangas Case", and comments as follows:

"The Netherlands Memorandum is preceded by a Note, reading as follows:

In the following memorandum various documents are being referred to. Authentic copies are available; they will be produced if desired by the Arbitrator. The more important of the documents are annexed to the memorandum.

This note is severely criticized in the United States Counter Memorandum. It 'indicates a procedure which it is believed may be properly characterized as remarkable and without precedent in international arbitrations. The treatment of evidence in cases before international tribunals is not governed by the rigid rules which are applied by domestic courts. ...'"

When the Arbitrator requested an explanation from the Netherlands Government on this point, it replied:

"'In the Opinion of the Netherlands Government, the necessity of evidence arises if the judge or arbitrator finds that the parties are divided with regard to certain facts which in his opinion can be considered doubtful, and which he thinks material and not known to him or to be ascertained by himself. He may accept as true the statements of either party when, in the light of the whole case, such statements seem to him sufficient or when the contestation of such statements by the other party does not seem to him to be sufficiently well-founded. On the other hand, he may ask for evidence about any point, even when it has not been contested, if he thinks it necessary to do so.'"

The Netherlands comment continues:

"Whereas in the Netherlands contention the civilian is speaking, the United States contention gives the view of the common lawyer, in whose ears the former opinion is 'heresay'. It must, however, be borne in mind that the present case is an arbitration under the Permanent Court of Arbitration and that the rules for the Arbitrator's conduct are to be found in the Hague Convention of 1907. ... from Article 72, paragraph 1 (les membres du tribunal ont le droit de poser des questions aux agents et aux conseils des parties et de leur demander des éclaircissements sur les points douteux), it appears that the Netherlands Government opinion is in accordance with the civil procedure, generally followed on the European Continent."

On the basis of these considerations, it concludes:

"It may thus be deemed established that, failing special provisions, an Arbitrator under a special agreement is wholly master of the situation; he is even to decide 'points left aside by the Parties'."

Replies from Governments to Questionnaires of the International Law Commission, A/CN.4/19, 23 March 1950, ILC Year Book, 1950, Vol. II, pp.153-154.

4. 17 RIAA 14.

5. Ibid. 11.

6. ICJ Reports, 1974, p. 9, para. 17.

7. Ibid., pp. 21-22, para. 48.

Similarly, but in more general terms, the arbitrator interpreted his competence as not denied by an ambiguous arbitration clause in the phase of the Preliminary Question of the Forest of the Central Rhodope of 4 November 1931. In the words of Arbitrator Osten Unden:

"Le Gouvernement défendeur (=Bulgarie) soutient qu'il convient, en cas de doute sur la portée d'une clause arbitral, de conclure toujours à l'incompétence de l'Arbitre, en raison du principe général selon lequel un Etat n'est obligé à recourir à l'arbitrage que dans les cas où il existe un engagement formel à cet effet. L'Arbitre ne saurait se rallier à ce principe d'interprétation des clauses arbitrales. Une telle clause doit être interprétée plutôt d'après la même méthode que les autres stipulations contractuelles. Si l'analyse du texte et l'examen de son but montrent que les raisons militent en faveur de la compétence de l'Arbitre sont plus plausibles que celles pouvant être invoquées en sens contraire, c'est aux premières qu'il convient de se ranger."

Sentence arbitrale (Question préalable), Affaire des Forêts du Rhodope central, 4 novembre 1931, 3 RIAA 1403.

8. 16 RIAAI 123.

9. Ibid.

10. Ibid.

11. Ibid.

12. Ibid. 173.

13. Compromis of 18 February 1983, Article 2, Tribunal Arbitral pour la Délimitation de la Frontière Maritime Guinée/Guinée-Bissau: Sentence du 14 février 1985, para. 1. 89 RGDIP 488 (1985).

14. Sentence, para. 70. Ibid. 515.

15. Sentence, para. 9. Ibid. 492-493.

16. Sentence, para. 76. Ibid. 517.

17. 16 RIAA 164-165.

18. Ibid. 166.

19. Ibid. 167. In a similar way the International Court of Justice held, in the Minquiers and Ecrehos case of 1953, that the later of the two alleged critical dates should be adopted to take into account all the relevant circumstances. The United Kingdom submits that, though the parties have for a long time disagreed as to the sovereignty over the Minquiers and Ecrehos groups, the dispute did not become 'crystalized' before the conclusion of the compromis of 29 December 1950, and that this date should be considered as the critical date, with the result that all acts before that date must be taken into consideration by the Court. By contrast the French Government contends that the date of the Convention of 1839, which concerned fishery and particularly the oyster fishery between the Island of Jersey and the neighbouring coast of France, should be selected as the critical date, and that all subsequent acts must be excluded from consideration. The Court in effect takes up the British contention for the following reasons:

"At the date of the Convention of 1839, no dispute as to the sovereignty over the Ecrehos and Minquiers Groups had yet arisen. The Parties had for a considerable time been in disagreement with regard to the exclusive right to fish oysters, but they did not link that question to the question of sovereignty over the Ecrehos and Minquiers. In such circumstances there is no reason why the conclusion of that Convention should have any effect on the question of allowing or ruling out evidence relating to sovereignty. A dispute as to sovereignty over the groups did not arise before the years 1886 and 1888, when France for the first time claimed sovereignty over the Ecrehos and the Minquiers respectively. But in view of the special circumstances of the present case, subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned. In many respects activity in regard to these groups had developed gradually long before the dispute as to sovereignty arose, and it has since continued without interruption and in a similar manner. In such circumstances there would be no justification for ruling out all events which during this continued development occurred after the years 1886 and 1888 respectively."

ICJ Reports, 1953, pp. 59-60. Such a procedural consideration of an equitable nature seems to have given rise to the Court's consideration of substantive matters: the exercise of jurisdiction, local administration and legislation. Ibid., pp. 65-67, 69-72.

20. 12 RIAA 301. See for a similar comment A. G., "Note", 62 RGDIP 121 (1958).

21. Duléry, Françoise, "L'Affaire du Lac Lanoux", 62 RGDIP 481-482 (1958).

22. Special Agreement, Article 1. 2 RIAA 832.

23. Ibid. 869.

24. Ibid.

25. Ibid.

26. Preamble. Ibid. 831.

27. Ibid. 866-867.
28. Ibid. 867.
29. Ibid. 869.
30. Ibid. 867.
31. Ibid. 870.
32. Ibid. 870-871.
33. Ibid. 850.
34. Huber, Max, "Observations" on "La Compétence du Juge International en Equité: Rapport préliminaire" by Eugène Borel, Institut de Droit International, 38 Annuaire 235 (1934).
35. De Visscher, Charles, De l'Equité dans le Règlement arbitral ou judiciaire des Litiges de Droit international public, 1972, p. 102. See also Friedmann, Wolfgang, The Contribution of English Equity to the Idea of an International Equity Tribunal, 1935, pp. 33-34.
36. PCIJ Publications, Series A/B, No. 53, p. 46.
37. Compromis, Article 3, paragraph (ii). 17 RIAA 8.
38. Ibid. 11.
39. Ibid. 528.
40. Ibid. 569-570.
41. "Chapter III: Historical Background", ibid. 31-63; "Chapter V: Surveys and Maps", ibid. 83-165; "Chapter VII: Certain Non-Cartographic Evidence", ibid. 252-323; "Chapter IX: Acts of 'Jurisdiction' in the Northern Half of Rann", ibid. 358-417.
42. Salmon, J. J. A., "La Sentence du 19 Février 1968 du Tribunal d'Arbitrage dans l'Affaire de la Frontière occidentale entre l'Inde et le Pakistan (Affaire de Rann de Kutch)", AFDI 236 (1968).
Incidentally, the above three cases may be compared with the Guatemala-Honduras Boundary case of 1933. In this case, the tribunal was urged by the compromis to effect a final solution for the boundary dispute, but allowed to modify the line of uti possidetis of 1821 as appropriate "according to equity and justice" (2 RIAA 1311, 1312, etc.). It actually decided the case on this latter basis while showing some careful comparison in the process.
43. Republic of Chile, Beagle Channel Arbitration between the Republic of Argentina and the Republic of Chile: Report and Decision of the Court of Arbitration, 1977, pp. 184-268.
44. Indeed Judge Gros says that the review was quite unnecessary. His "declaration", ibid., p. 274.
45. De La Rochère, Jacqueline Dutheil, "L'Affaire du Canal Beagle (Sentence rendue par la Reine d'Angleterre le 22 avril 1977)", AFDI

428 (1977), where she says: "Dans la meilleure tradition anglo-saxonne qui a tellement marqué la pratique judiciaire internationale, il examine toutes les preuves, tous les arguments des parties afin de se former une opinion."

46. Fitzmaurice, Gerald G., "Hersch Lauterpacht and His Attitude to the Judicial Function", 50 BYBIL 11 (1979).

47. In some recent arbitral and judicial decisions on the delimitation of continental shelf boundaries, it is emphasized that the primary purpose of delimitation by application of equitable principles, including the equidistance principle, is the equitable settlement of the dispute. See, for example, the North Sea Continental Shelf cases of 1969, ICJ Reports, 1969, p. 50, para. 92; the Anglo-French Continental Shelf case of 1977, Cmd. 7438, paras. 70, 97, 239, 251; the Tunisia-Libya Continental Shelf case of 1982, ICJ Reports, 1982, paras. 70, 103, 114, 133; the Gulf of Maine case of 1984, ICJ Reports, 1984, p. 339, para. 230, p. 344, para. 241; the Guinea-Guinea Bissau Maritime Boundary Delimitation case of 1985, Sentence du 14 février 1985, para. 88, 89 RGDIP 521 (1985); the Libya-Malta Continental Shelf case of 1985, ICJ Reports, 1985, para. 79A(1). The importance of an equitable solution is likewise stressed in Articles 74/83 of the new United Nations Convention on the Law of the Sea.

48. 11 RIAA 107.

49. Ibid. 108.

50. Ibid. 111.

51. Ibid. 115.

52. Ibid. 116.

53. ICJ Reports, 1960, p. 216.

54. Article 1. 1 RIAA 290.

55. Ibid. 292.

56. Ibid. 293.

57. Ibid. 294. De Lapredelle-Politis characterize the award as based on equity: "Au cours de la procédure, les pouvoirs de l'arbitre ayant paru trop étroits, un protocole fut signé le 15 février 1886 pour les élargir. Désormais le Roi d'Espagne n'était pas obligé de borner son choix, suivant la stricte application de l'uti possidetis juris, à l'une des lignes proposées par les parties: il était autorisé à se fonder sur l'équité pour fixer ceux des points de la ligne frontière qui ne pouvaient pas être exactement situés sur la base des documents." A. de Lapradelle et N. Politis, "L'indivisibilité de la Frontière et le Conflit Colombo-Vénézuélien", Extrait de la RGDIP 10 (1921).

58. 11 RIAA 294.

59. Ibid. 267.

60. Ibid. 272.
61. Ibid. 268.
62. Ibid. 302-304.
63. Ibid. 304-305.
64. Ibid. 305-306.
65. See for a similar evaluation of the case Cukwurah, A. O., The Settlement of Boundary Disputes in International Law, 1967, p. 180.
66. 11 RIAA 199. See also de Visscher, Charles, Problèmes de Confins en Droit international public, 1969, pp. 113-114.
67. Article 2. 9 RIAA 35.
68. Ibid. 40. Dr. Alexandre Alvarez, however, makes a different comment. He says that the general arbitration treaty of 28 May 1902 improved the relations of the parties, and that whatever its content might have been, the arbitral award would have been accepted, "Des Occupations de Territoires contestés: à propos de la question de limites entre le Chile et la République Argentine", Extrait de la RGDIP 23 (1903). More specifically he comments that the tribunal took into account the territorial occupation by Argentina after the start of the litigation, not basing itself on any scientific consideration of orography, hydrography or topography. He denies that the tribunal decided on the basis of equity. Ibid. 31-32.
69. Article 2, paragraph 1. Cmnd. 7438, p. 6.
70. Ibid., p. 48, para. 70.
71. Ibid.
72. ICJ Reports, 1978, p. 21, para. 48.
73. Ibid., p. 34, para. 81.
74. Ibid. The judgment repeats: "The particular circumstances of the present dispute have also to be taken into account." Ibid., p. 36, para 87.
75. ICJ Reports, 1959, p. 225. It is interesting to note that the award of the Franco - Mexican Georges Pinson case of 1928, a claims case, says: "Si l'usage du mot 'équité' dans ce contexte se heurte à des objections, je (=president of the tribunal) suis tout disposé à le remplacer par 'liberté d'apprécier les preuves selon les circonstances concomitantes'." 5 RIAA 414.
76. Descamps-Renault, Recueil International des Traités de XX^e Siècle 750 (1902).
77. Ibid. 745.
78. Ibid. 735.

79. Ibid. 748.
80. Ibid. 749.
81. Ibid. 750.
82. Ibid.
83. Ibid.
84. Article 2. 89 BFSP 715 (1896, 1897).
85. Ibid. 724.
86. Ibid. 729.
87. Ibid. 748.
88. 11 RIAA 328.
89. Ibid.
90. Convention for the Arbitration of the Chamizal Case concluded on 24 June 1910, Preamble, ibid. 313.
91. Ibid. 329.
92. ICJ Reports, 1962, p. 15. Judge Sir Gerald Fitzmaurice, in his separate opinion, points out that the Court should have specified the reason why it dismissed considerations of a topographical, historical and cultural nature:
"The Court has dismissed these in a sentence, as not being legally decisive. I agree that they are not; but I think it desirable to say why, since these considerations occupied a prominent place in the arguments of the Parties. Such matters may have some legal relevance in a case about territorial sovereignty which turns on the weight of factual evidence that each party can adduce in support of its claim, and not on any more concrete and positive element, such as a treaty. In the present case it is accepted, and indeed contended by both Parties, that their rights derive from the treaty settlement of 1904, and on the subsequent events relative to or affecting that settlement. In consequence, extraneous factors which might have weighed with them in making that settlement, and more particularly in determining how the line of the frontier was to run, can only have an incidental relevance in determining how the line of the frontier was to run, can only have an incidental relevance in determining where today, as a matter of law, it does run." (Ibid., p. 53.)
This is an equitable consideration for the positions of the parties, and would seem to foreshadow how he is some years later to give similar considerations to the "corroborative or confirmatory incidents and material" as President of the Court of Arbitration in the Beagle Channel case. See supra notes 43 and 46 and the accompanying texts.
93. ICJ Reports, 1962, p. 32.

94. Lauterpacht, Hersch, "Sovereignty over Submarine Areas", 27 BYBIL 389-390 (1950).
95. ICJ Reports, 1962, p. 41. For a critical comment on this point, see subsection 4)-d).
96. For a detailed description of the incident, see ICJ Reports, 1962, pp. 89-91.
97. Ibid., p. 90, para. 33.
98. Ibid., p. 91, para. 34.
99. Ibid., pp. 96-97, para. 46.
100. Ibid., p. 128.
101. Ibid., p. 129.
102. Ibid.
103. Ibid., p. 131.
104. ICJ Reports, 1969, p. 49, para. 89.
105. Ibid., p. 54, para. 101.
106. Ibid., p. 53, para. 101.
107. Cmnd. 7438, pp. 113-114, paras. 240-244.
108. Ibid., p. 113, para. 240.
109. Ibid., p. 114, para. 244.
110. Ibid., p. 116, para. 248.
111. The Court does not say anything further about what the "one instance" (Ibid., p. 117, para. 251.) is, but it would presumably be how Kharg Island off the 12-mile Iranian territorial sea was treated in the Iran-Saudi Arabia agreement of 1968 on the maritime boundary delimitation. For a description of the half-effect given to Kharg Island in the agreement initialled on 13 December 1965 (which was later formally signed on 24 October 1968), see Al-Baharna, Husain M., The Legal Status of the Arabian Gulf States: A Study of Their Treaty Relations and Their International Problems, Manchester University Press, 1968, pp. 310-311. See also United States Department of State, Bureau of Intelligence and Research, Office of the Geographer, Limits in the Seas, No. 24 for a more detailed analysis of the 1968 agreement.
112. Cmnd. 7438, pp. 116-117, para. 249.
113. Ibid., p. 117, para. 251.
114. Ibid.

115. Ibid., p. 192, para 110. Professor D. W. Bowett, who acted as a member of counsel for the British Government in the 1977 arbitration, comments that the "half-effect" technique is an original device of the Court: "France at no stage argued that the Scillies should be given a reduced effect nor, for obvious reasons, did the United Kingdom. Thus, the treatment of the boundary as a lateral boundary, the decision to give to the Scillies half-effect, and above all the technique of applying half-effect, were all matters of crucial importance, but none was argued by the Parties." Bowett, D. W., "The Arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches", 49 BYBIL 21 (1978). He also says that the half-effect to Kharg Island "may well have been based entirely on what was politically feasible at that time, having nothing to do with the Parties' conception of equity". Ibid. 20. Professor Quéneudec calls the half-effect solution a sort of compromise: "Se fondant sur un précédent fourni par la pratique conventionnelle, le Tribunal décide en quelque sorte de 'couper la poire en deux' et de n'attribuer à ces îles qu'un demi-effet dans le tracé de la ligne de délimitation." Quéneudec, J.-P., "L'Affaire de la Délimitation du Plateau continental entre la France et le Royaume Uni", 83 RGDIP 100 (1979).

116. ICJ Reports, 1982, p. 21, para. 1.

117. Ibid., p. 23, para. 4.

118. Ibid., pp. 60-61, para. 72.

119. Ibid., p. 63, para. 78.

120. Ibid., p. 64, para. 79.

121. Ibid., pp. 83-85, paras. 117-119.

122. Ibid., p. 91, paras. 130-131.

123. Ibid., p. 63, para. 78.

124. Ibid., p. 87, para. 124. This reference-point is used for two purposes: for obtaining a line which, extending from that point on its parallel of latitude, is to intersect the initial delimitation line extending from the outer limit of the territorial sea (ibid., p. 87, para. 124.) and for obtaining a line giving half-effect to Kerkennah Islands which is a bisector of the angle produced by drawing a line between that point and Ras Kaboudia and another between that point and the most seaward point of the Islands (ibid., pp. 88-89, paras. 128-129.).

125. ICJ Reports, 1985, paras. 21, 22. See also Map 2 attached to the judgment.

126. Ibid., para. 52.

127. Ibid., para. 53.

128. Ibid., para. 69.

129. Ibid.

130. Ibid., para. 72. See also ibid., para. 73 for a summary description of the delimitation method.
131. Ibid., para. 73.
132. Ibid., Dissenting Opinion of Judge Schwebel, pp. 10-11.
133. Ibid., p. 11.
134. Ibid., pp. 14-15.
135. Ibid., p. 15.
136. 11 RIAA 153-154.
137. Article 2. Ibid. 153.
138. Ibid. 160.
139. Ibid. For a sympathetic comment on this aspect of the award, see Rhee, Sang-Myon, "Sea Boundary Delimitation between States before World War II", 76 AJIL 571 (1982).
140. Ibid. 161.
141. For a comment that the award dealt mainly with facts and only incidentally with principles of international law, see "Editorial Comment", 4 AJIL 187 (1910).
142. 11 RIAA 162.
143. Republic of Chile, supra note 43, at p. 182, para. 110.
144. Ibid., p. 350, para. 4.
145. Ibid., p. 272, para. 2.
146. Cmd. 7438, p. 90, para. 185.
147. Ibid., p. 90, para. 187. But the Court declines to take account of the security concern of the Parties in the region. The French urge that there should be a "continuous link between the eastern and western parts of its continental shelf in the Channel", and the British that there should be a "continuous link between the continental shelf of the Channel Islands and that of the mainland". However, "the weight of such considerations in this region is, in any event, somewhat diminished by the very particular character of the English Channel as a major route of international maritime navigation serving ports outside the territories of either of the Parties." Ibid., p. 91, para. 188.
148. Ibid., p. 91, para. 187.
149. But Professor Bowett is critical of this solution:
"... it might be said that the Court's award of 12 miles in effect concedes to them no more than their entitlement to a 12-mile territorial sea and accords to them no true shelf at all. Indeed, the result only serves to emphasize the

subjectivity of notions of 'equity', for the 12-mile enclave is not a reasoned result: the Court gives no particular reasons why the enclave should be 12 miles rather than, say, 14 miles. The existence of a 12-mile fishery zone was a fact, but scarcely a reason germane to shelf determination and the Court does not suggest why the two delimitations should coincide."

Bowett, D. W., supra note 115, at p. 9.

150. General Assembly resolution 3292 (XXIX) of 13 December 1974, operative paragraph 1, reproduced in ICJ Reports, 1975, p. 14, para. 1.

151. Ibid., p. 68, para. 162.

152. For a contrary view, see Okere, B. O., "The Western Sahara Case", 28 ICLQ 312 (1979): "In the process the Court operated a delicate balancing act which recognized all and yet satisfied none."

153. Ibid. 305-306.

154. ICJ Reports, 1975, p. 41, para. 87.

155. The phrase means international law particular to Moslem States. Okere, supra note 152, at 305.

156. ICJ Reports, 1975, p. 42, para. 88.

157. Ibid., p. 42, para. 89.

158. Article 9 of the Statute of the International Court of Justice runs:

"At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

159. ICJ Reports, 1951, p. 127.

160. Ibid., p. 128.

161. Ibid.

162. Cmnd. 7438, p. 77, para. 148.

163. Ibid., p. 85, para. 170.

164. Ibid., p. 94, paras. 196-197.

165. Ibid., p. 94, para. 197.

166. Ibid., p. 94, para. 198.

167. Ibid., pp. 95-96, paras. 201-202. For a criticism of this solution by Professor Bowett, see supra note 149.

168. ICJ Reports, 1982, p. 63, para. 79.

169. Ibid., p. 64, para. 79.
170. Ibid., pp. 88-89, para. 128.
171. Judge Schwebel points this out in his separate opinion. Ibid., p. 99.
172. Ibid., p. 89, para. 129. See also the Gulf of Maine case of 1984 in which the Chamber gave Seal Island off the southwestern tip of Nova Scotia a "half-effect" in calculating the length of the Canadian coastlines. ICJ Reports, 1984, pp. 336-337, para. 222.
173. Compromis of 18 February 1983, Article 2. Tribunal Arbitral pour la Délimitation de la Frontière Maritime Guinée/Guinée Bissau: Sentence du 14 février 1985, para. 1. 89 RGDIP 488 (1985).
174. Sentence, para. 106. Ibid. 527.
175. Sentence, para. 111, subpara. a). Ibid. 529.
176. Article 2. 176 Parry 449.
177. Article 1. Ibid.
178. (1894) US For. Rel. Appendix I 112.
179. The United States Agent describes the nature of the "Regulations" in his Final Report to his Government:
"The regulations as finally framed and promulgated are the result of an honest and conscientious effort on the part of the neutral arbitrators to do all they conceived possible and necessary for the protection and preservation of the seal herd consistent with their decision on the fifth point."
1 Moore 959.
180. (1894) US For. Rel. Appendix I 113.
181. ICJ Reports, 1951, p. 128.
182. Ibid., p. 133.
183. ICJ Reports, 1974, pp. 24-25, paras. 55-56.
184. Ibid., p. 25, para. 57.
185. Ibid., p. 23, para. 52. See also ibid., pp. 25-26, paras. 57-58 for a discussion of State practice on this concept.
186. ICJ Pleadings, Fisheries Jurisdiction cases, Vol. I, 1975, p. 12.
187. ICJ Reports, 1972, p. 16, para. 23. The Court referred to the Faroe Islands' exceptional dependence on fisheries as provided for in the Arrangement Relating to Fisheries in Waters Surrounding the Faroe Islands of 18 December 1973. ICJ Reports, 1974, p. 26, para. 58.
188. ICJ Reports, 1969, p. 51, para. 97.

189. Ibid., p. 52, para. 97.
190. Ibid., p. 53, para. 101.
191. Ibid., pp. 66-84. The Judgment of the Court lacks considerations of this sort, presumably because the Parties, and especially the Federal Republic of Germany, contended, in reply to a question put to them by Judge Jessup, that the present cases should be considered from geographical, rather than economic, points of view. See reply of Professor Jaenicke, Agent for the Federal Republic, at the 9th Public Hearing on 4 November 1968. ICJ Pleadings, North Sea Continental Shelf cases, Vol. II, 1968, p. 164.
192. ICJ Reports, 1982, pp. 320-321.
193. Ibid., p. 71, para. 96.
194. Ibid., p. 321.
195. 11 RIAA 160.
196. Ibid.
197. See above (2)-1)-b) "Consideration of actual circumstances".
198. ICJ Reports, 1982, p. 71, para. 96.
199. Ibid., pp. 83-84, para. 117.
200. Ibid., p. 84, para. 118.
201. Ibid., pp. 84-85, para. 119. As has been seen in the quotation, the modus vivendi was entered into for the lateral delimitation of fisheries jurisdiction. It was taken into account in adopting the 26° line, and yet Tunisia's historic sponge-fishing rights were disallowed in the delimitation (ibid., pp. 76-77, para. 105). On the other hand, Judge Ago, in his separate opinion, stresses the importance of historic fishing rights (ibid., pp. 96-98, paras. 2-5) as does Judge ad hoc Jiménez de Aréchaga in general terms in his separate opinion. On the significance of the taking of sponges for a continental shelf delimitation, Judge ad hoc Jiménez de Aréchaga has this to say:
"The taking of sponges, as of other living resources permanently attached to the sea-bed at the harvestable stage was considered by the International Law Commission and defined in the 1958 Convention, not as a sedentary fishery, but as a form of shelf exploitation, as much as is the extraction of oil and gas. Consequently, the taking of sponges in the area was really an exploitation of shelf resources, which began in Tunisia and Tripolitania in the last century, and continued into the present century, thus long antedating the Truman proclamation."
Ibid., p. 123, para. 81.
202. 89 BFSP 61.
203. ICJ Reports, 1969, p. 50, para. 93.
204. See Miyoshi, Masahiro, "Some Comments on Legal Aspects of Precedents for Joint Development", The South China Sea: Hydrocarbon

Potential and Possibilities of Joint Development (Proceedings of the EAPI/CCOP Workshop, East-West Centre, Honolulu, Hawaii, 5-12 August 1980), 1981, p. 1361.

205. Cmnd. 7438, p. 92, para. 192.

206. Ibid., p. 93, para. 194.

207. See above (2)-1)-e) "Presence of islands as a special circumstance".

208. ICJ Reports, 1982, p. 21.

209. Ibid., p. 109, para. 35.

210. 176 Parry 451.

211. (1894) US For. Rel. Appendix I 112.

212. Ibid. 112-113.

213. Final Report of the United States Agent to his Government, 1 Moore 959.

214. PCIJ Publications, Series A/B, No. 70, pp. 73-74.

215. Ibid., p. 74.

216. Ibid., p. 75.

217. Ibid., pp. 76-77.

218. Ibid., p. 77.

219. Ibid., p. 78.

220. Ibid., pp. 78-79.

221. 12 RIAA 301-302. The issue, as it was originally phrased in Article 1 of the compromis of 19 November 1956 was:

"Le Gouvernement français est-il fondé à soutenir qu'en exécution, sans un accord préalable entre les deux Gouvernements, des travaux d'utilisation des eaux du lac Lanoux dans les conditions prévues au projet et aux propositions français visés au préambule du présent compromis, il ne commettrait pas une infraction aux dispositions du Traité de Bayonne du 26 mai 1866 et de l'Acte additionnel de la même date?"

Ibid. 286.

222. Ibid. 308.

223. Ibid. 306.

224. Ibid. 309, 314. See a comment by Schachter: "Recent trends, particularly in the wake of heightened environmental concerns, suggest the emergence of a general rule of international law for a 'system of information and prior consultation' in regard to the utilization of

the common resources of two or more states." Schachter, O., Sharing the World's Resources, 1977, p. 69. See also Handl, G., "The Principle of 'Equitable Use' as Applied to Internationally Shared Natural Resources: Its Role in Resolving Potential International Disputes over Transfrontier Pollution", 14 RBDI 56 (1978/79-I), where the author discusses the duty of information and consultation. For some examples of the 'international duty of information and consultation', see ibid. 56-61.

225. 12 RIAA 315.

226. Ibid. 317.

227. Ibid.

228. 11 RIAA 175, 194.

229. Ibid. 195.

230. ICJ Reports, 1974, pp. 28-29, paras. 63-65.

231. Ibid., p. 30, para. 70.

232. Ibid., p. 30, paras. 69-70.

233. Ibid., p. 31, para. 71.

234. ICJ Reports, 1969, p. 50, para. 94.

235. Ibid., p. 52, para. 98.

236. Ibid., p. 54, para. 101.

237. See Miyoshi, Masahiro, "The Role of Equitable Principles in the Delimitation of Maritime Boundaries", The Ocean Association of Japan, The Frontier of the Seas: the Problems of Delimitation (Proceedings of the 5th International Ocean Symposium 1980), 1981, p. 43.

238. ICJ Reports, 1969, p. 52, para. 98.

239. U. S. Department of State, Bureau of Intelligence and Research, Office of the Geographer, 83 Limits in the Seas 13-15 (1979).

240. Cmnd. 7438, p. 60, para. 99.

241. Ibid., p. 60, para. 100.

242. Ibid., p. 61, para. 101.

243. Ibid., p. 89, para. 182.

244. ICJ Reports, 1982, p. 91, para. 130.

245. Ibid., p. 91, para. 131.

246. Ibid., p. 93, para. 133.

247. Ibid., p. 138, para. 117.

248. Ibid., p. 152, para. 17.
249. Ibid., p. 259, para. 163.
250. Ibid., p. 314, para. 23.
251. ICJ Reports, 1984, p. 323, para. 185.
252. Ibid., p. 322, para. 184.
253. Ibid., pp. 336-337, paras. 221-223. Judge Schwebel attached a separate opinion in which he criticized the Chamber for its inclusion of the whole of the Bay of Fundy coastlines in the calculation of the Canadian coasts' length. By way of illustration, he pointed out, on the basis of the United States pleadings, the distorting effect of the inclusion. He states that the "inclusion of the whole of the Bay of Fundy increases by just 7 per cent the sea area appertaining to Canada in the proportionality test ... while at the same time it increases the Canadian coastline length by 93 per cent." (Ibid., p. 356.) He agreed to the idea of including limited portions of the Bay of Fundy coastlines.
254. ICJ Reports, 1985, para. 68.
255. Ibid.
256. Ibid., para. 56.
257. ICJ Reports, 1969, p. 51, para. 96.
258. ICJ Reports, 1985, para. 73.
259. Ibid.
260. Ibid., para. 72.
261. Ibid., para. 75.
262. Article 4. 89 BFSP 60-61.
263. Gist of what Sir Richard Webster, counsel for the British Government, said of the discretionary power of the tribunal on the 2nd day of the oral arguments, 15 June 1899. Proceedings of the Arbitration between the Government of Her Britannic Majesty and the United States of Venezuela: British Guiana-Venezuela Boundary, Paris, 1899, Vol. 1, pp. 20-21. (Hereinafter to be cited as Proceedings.)
264. Precisely, these are the words of Lord Russell, one of the arbitrators, which Sir Robert Reid, counsel for the British Government, endorsed by saying: "Yes, that is what we mean." 36th day, 30 August 1899. Ibid., Vol. 8, p. 2254.
265. The words of Mr. Soley, counsel for the Venezuelan Government, on the 35th day, 29 August 1899. Ibid., Vol. 7, p. 2168.
266. The words of Lord Russell which Mr. Soley acceded to. Ibid.

267. The president of the tribunal disclosed this number in his final remarks on the 56th day of the proceedings. Ibid., Vol. 11, p. 3238.
268. See the text of the award read by Mr. d'Oyly Carte, Assistant Secretary of the Tribunal, on the 56th day of the proceedings. Ibid., pp. 3237-3238.
269. Lauterpacht, H., Private Law Sources and Analogies of International Law (with special reference to international arbitration), London, 1927, p. 230.
270. Venezuelan Case, Vol. 1, p. 230.
271. Proceedings, Vol. 9, pp. 2599, 2603.
272. British Counter-Case, p. 135.
273. Ibid., p. 114; Proceedings, Vol. 8, pp. 2238-2239; Ibid., Vol. 11, pp. 3110-3111.
274. Proceedings, Vol. 3, pp. 819-849.
275. British Case, pp. 119-120; British Counter-Case, pp. 130-142; Venezuelan Case, Vol. 1, pp. 221-229; Venezuelan Counter-Case, Vol. 1, pp. 71-72.
276. Venezuelan Case, Vol. 1, pp. 155-156; Venezuelan Counter-Case, Vol. 1, p. 33.
277. British Case, pp. 15, 37, 52-54, 78.
278. Ibid., p. 78.
279. Venezuelan Case, Vol. 1, pp. 222-223; British Case, p. 78; British Counter-Case, pp. 130-131.
280. Venezuelan Case, Vol. 1, p. 222; British Counter-Case, p. 131.
281. Printed Argument of Venezuela, Vol. 1, p. 140.
282. British Case, p. 32.
283. British Counter-Case, pp. 103-105.
284. British Case, p. 50.
285. Ibid., p. 16.
286. Ibid., p. 51.
287. Ibid., pp. 17, 57-58.
288. Ibid., p. 62.
289. Ibid., pp. 62-63.
290. Ibid., p. 63.

291. Ibid.
292. Ibid., p. 64.
293. Venezuelan Case, Vol. 1, p. 199.
294. British Counter-Case, p. 127.
295. British Case, p. 17.
296. Printed Argument of Venezuela, Vol. 1, pp. 125-126.
297. British Case, p. 70.
298. Venezuelan Case, Vol. 1, p. 205.
299. British Case, p. 70.
300. British Counter-Case, p. 134.
301. Printed Argument of Venezuela, Vol. 1, pp. 60-61.
302. British Case, pp. 73, 74-75.
303. Printed Argument of Venezuela, Vol. 1, 125-126.
304. British Case, p. 77.
305. Proceedings, Vol. 11, p. 3237.
306. See British Case, p. 70.
307. The Times, 4 October 1899, p. 6.
308. Article 3. 11 RIAA 139.
309. Article 4. Ibid.
310. According to P. Fiore, who comments on this case, the Advisory Commission arrived at the following conclusion:
"Après avoir étudié les allégations écrites, les répliques et les critiques des ministres des deux Républiques, comme défense de leurs doctrines respectives, nous sommes arrivés à la conclusion que les lois de la Recopilacion des Indes, les cédulas et décrets royaux, les ordonnances des Intendants, les actes diplomatiques relatifs à la démarcation des frontières et en général les documets d'un caractère officiel produits pour donner leur véritable signification et exécution auxdites dispositions royales ne définissent pas d'une manière claire et précise le domaine du territoire discuté." (Livre bleu argentin, pp. 85, 86.)
Fiore, P., "Observations sur la Sentence arbitrale rendue par le Président de la République argentine le 9 juillet 1909 dans le Conflit entre la République de Bolivie et Celle du Pérou au Sujet de la Délimitation de la Frontière de ces Deux Etats", 17 RGDIP 243-244 (1910).
311. 11 RIAA 143.

312. Ibid.
313. Ibid.
314. Fiore, supra note 310, at 235, 241; Weiss, André, "L'Arbitrage de 1909 entre la Bolivie et le Pérou", 17 RGDIP 126-136, esp. 130-136 (1910).
315. The compromis of 1 November 1901, Article 4. 11 RIAA 18.
316. Ibid. 21.
317. Ibid. 22.
318. Ibid.
319. Ibid. 23.
320. Fauchille, Paul, Le Conflit de Limites entre le Brésil et la Grande-Bretagne et la Sentence arbitrale du Roi d'Italie, 1905, p. 117.
321. Ibid., pp. 117-120. For a similar detailed criticism of the award, see De Laparadelle, A. et N. Politis, "L'Arbitrage Anglo-Brésilien de 1904", 22 Revue de Droit public et de la Science politique en France et à l'Etranger 241-345, esp. 301-345 (1905).
322. See supra note 316 and accompanying text.
323. 11 RIAA 69.
324. Ibid. 68.
325. The compromis of 16 July 1930, Article 5. 2 RIAA 1311.
326. Ibid. 1322.
327. Ibid. 1323.
328. Ibid. 1323-1325.
329. Ibid. 1336.
330. Ibid. 1337.
331. Ibid. 1341.
332. Ibid. 1342.
333. Ibid. 1352.
334. See supra Section 2-(1)-1).
335. 2 RIAA 1325-1351, 1351-1364.
336. ICJ Reports, 1959, pp. 231-232.

337. Ibid., p. 250, where Judge Armand-Ugon refers to the Fisheries case of 1951, ICJ Reports, 1951, p. 138.
338. Ibid., p. 255.
339. The compromis of 24 June 1910, Preamble. 11 RIAA 313.
340. Article 3. Ibid. 313-314.
341. 102 Parry 36.
342. 11 RIAA 321.
343. 111 Parry 237.
344. 164 Parry 338-339.
345. See 11 RIAA 328.
346. Ibid. 329-330.
347. Ibid. 330.
348. Ibid. 332-333.
349. Ibid. 322.
350. Ibid.
351. Twiss, The Law of Nations, 2nd ed., 1875, p. 8, as quoted ibid. 355.
352. Ibid.
353. A brief account of the final settlement of the Chamizal dispute may be found in Cukwurah, A. O., The Settlement of Boundary Disputes in International Law, 1967, pp. 206-208. For a more detailed discussion of the settlement of this case, see Miyoshi, Masahiro, "On the Settlement of the Chamizal Case" (in Japanese), A Collection of Legal Essays in Commemoration of the 125th Anniversary of Keio-Gijuku, 1983, pp. 125-150.
354. The compromis of 1 April 1965, Article 1, paragraph (2). 16 RIAA 119. See also ibid. 163.
355. Article 1, paragraph (1). Ibid. 119.
356. Ibid. 172.
357. Ibid. 154.
358. Ibid. 173.
359. Ibid. 177.
360. Ibid. 177-179.
361. Ibid. 180.

362. Rousseau, Charles, "Chronique des faits internationaux", 71 RGDIP 172 (1967).

363. Jennings, R. Y., "The Argentine-Chile Boundary Dispute: a case study", International Disputes: The Legal Aspects, 1972, pp. 324-325.

In contrast to such suspected considerations for the Chilean settlers in this case, a legally based decision rejected the claim that a boundary line dividing the territory of the native people would be contrary to the relevant treaty in the Netherlands-Portugal Island of Timor case of 1914. Portugal claimed that a direct north-south line between two river sources would divide the territory of the Portuguese Ambenos, which would be contrary to the treaty of 1859. But the arbitrator rejected this objection, seemingly based on equitable considerations, for the following reasons of a legal nature:

"L'objection que les territoires d'une même tribu ne doivent pas être morcelés, ne saurait ainsi retenue par l'arbitre, car elle aurait dû être présentée au cours des négociations de 1902-1904; actuellement, elle est tardive, parce que le traité de 1904 ... ne fait aucune mention d'une volonté des Parties de ne jamais séparer des populations indigènes; ce traité a au contraire tracé le ligne de démarcation à la suite de Conférence au cours desquelles il a été entendu que les considérations de ce genre ne doivent pas être prépondérantes."

11 RIAA 507.

364. 16 RIAA 124-140.

365. It may be of interest to note that Mr. E. Lauterpacht, one of counsel on behalf of Chile in the proceedings, in his oral argument on the 9th day, quoted a passage from Wittemore Boggs' book on International Boundaries of 1940. Of particular interest is the following part:

"The common sense view is ... that a good boundary is one which serves the particular purposes for which it is designed, with a maximum of efficiency and a minimum of friction."

Oral Arguments on behalf of the Government of the Republic of Chile, Corrected Transcript of Oral Hearings (mimeo.), 1966, Vol. II, p. 95.

366. ICJ Reports, 1984, p. 300, para. 113.

367. The Special Agreement of 29 March 1979, Article II, paragraph 1. Ibid., p. 253, para. 5.

368. Ibid., p. 328, para. 197.

369. Ibid., p. 342, para. 237.

370. Ibid.

371. 11 RIAA 180.

372. Ibid. 188-189.

373. Ibid. 176.

374. Ibid. 191.

375. Lansing, Robert, "The North Atlantic Coast Fisheries Arbitration", 59 University of Pennsylvania Law Review 138 (1910).
376. The text of Article 89 of the Treaty of Sèvres is reproduced in the award. 31 Bulletin de l'Institut Juridique International 329 (1934).
377. Hackworth, 1 Digest of International Law 715.
378. Ibid. 715-716.
379. 31 Bulletin de l'Institut Juridique International 334, note 1. See also ibid. 335 for that portion of the award in which the arbitrator suggests to the Boundary Commission a consultation with the local inhabitants.
380. 3 RIAA 1819.
381. Ibid. 1820.
382. Ibid. 1824.
383. Ibid. A similar example of identifying equity with ex aequo et bono can be found in Article 7, paragraph 3, of the Statute of the Mixed Commission for the iron gates of 30 November 1963 between Yugoslavia and Romania, which reads:
 "The Board for the Settlement of Differences shall settle differences in accordance with the provisions of the Agreement, Conventions and Protocols concerning the Iron Gates System and, in the absence of any provisions applicable to the specific case, in accordance with equity (ex aequo et bono)."
- 513 UNTS 160. Assuming that this is a correct translation of the original Serbo-Croatian and Romanian texts, it clearly takes the expressions of "in accordance with equity" and "ex aequo et bono" to be interchangeable.
384. 3 RIAA 1824-1825. This was in effect envisaged in Article 7 of the compromis. Ibid. 1820. Woolsey comments:
 "And so the century-old controversy over the deserts and marshes of Gran Chaco has been finally settled. The boundary apparently gives Paraguay something more than her military position at the time, but less than her farthest demands. On the whole she has increased her territory over one and one-half times and in excess of any of the previous tentative agreements. On the other hand, the line runs approximately one hundred miles short of the oil fields of Bolivia and gives her access to the sea through the Paraguay and Parana Rivers."
- Woolsey, L. H., "The Settlement of the Chaco Dispute", 33 AJIL 128 (1939). La Foy points out that pressure was put on "the belligerents until sufficient concessions were granted to make an agreement possible". La Foy, Margaret, The Chaco Dispute and the League of Nations, 1941, p. 142. Schurz, formerly American Commercial Attaché at Rio de Janeiro and other posts in Latin America, predicted in 1929 that "international equity demands that Bolivia have a direct outlet to the Paraguay River at some point". Schurz, William L., "The Chaco Dispute between Bolivia and Paraguay", Foreign Affairs, July, 1929, p. 655.

385. 17 RIAA 571.

386. See Untawale, M. G., "The Kutch-Sind Dispute: A Case Study in International Arbitration", 23 ICLQ 830-831 (1974). One would be reminded of another instance of considerations for peace as given in the report of 16 July 1925 presented to the Council of the League of Nations by the Commission constituted pursuant to a resolution of 30 September 1924 on the question of the Turkey - Iraq frontier. The report invokes "l'importance primordiale d'une paix durable et de bonnes relations entre les pays voisins. Cet argument implique ... une solution qui donne à l'Irak le territoire qui lui est nécessaire pour vivre et se développer." S.D.N., C.400. M.147, 1925, VII, p. 86, as quoted in Bardonnnet, D., "Equité et Frontières terrestres", Mélanges offerts à Paul Reuter: Le Droit international: Unité et Diversité, 1981, p. 45, note 35.

387. 33 AJIL 357 (1939).

388. Ibid. 358.

389. Treaty of Peace of 24 December 1814 (Treaty of Ghent), Article 4. 63 Parry 424. See the Treaty of Amity, Commerce and Navigation of 19 November 1794 (Jay Treaty) between Great Britain and the United States, Article 5. 52 Parry 249.

390. Treaty of Ghent, Article 4. 63 Parry 424.

391. Moore, 6 International Adjudications, Modern Series 36.

392. Ibid. 37.

393. 1 Lapradelle-Politis 304.

394. The Times, 4 October 1899. p. 6.

395. Ibid. On the 56th and last day of the proceedings the president of the tribunal stated in his closing address:

"Ici, nous avons eu le bonheur d'avoir l'unanimité sur tous les articles de la sentence, sans aucune réserve.

"Permettez-moi de croire que, dans les conflits internationaux de l'Arbitrage, cette unanimité est un immense bien; c'est un fait qu'il est nécessaire d'affirmer et de proclamer, et je crois que c'est là un idéal vers lequel il faut tendre; parce que, s'il y a force légale pour les Puissances en litige dans une sentence arbitrale adoptée à la majorité, il y manque cette force morale qui est d'un bien autre prix encore."

Proceedings, Vol. 11, p. 3240.

396. The Times, 4 October 1899, p. 6.

397. Dennis, W. C., "The Venezuela - British Guiana Boundary Arbitration of 1899", 44 AJIL 727 (1950). See also the same author, "Compromise--the Great Defect of Arbitration", 11 Columbia Law Review 493-513 (1911). It would not be necessary to go into the details of the controversy as to whether the president of the tribunal exerted pressure on the arbitrators nominated by Venezuela to secure a unanimous compromise. For the memorandum of Mallet-Prevost, who acted as counsel for Venezuela in the arbitration, and the ensuing

discussion on the alleged pressure or transaction, see Schoenrich, Otto, "The Venezuela - British Guiana Boundary Dispute", 43 AJIL 523-530 (1949); Child, Clifton J., "The Venezuela-British Guiana Boundary Arbitration of 1899", 44 AJIL 682-693 (1950); Dennis, op. cit., ibid. 720-727.

By way of comparison reference may be had to a diplomatic settlement of the Afghan frontier dispute between Great Britain and Russia in 1887. By a protocol of 10 September 1885 the Commissioners nominated by the parties were instructed to examine and trace "sur les lieux les détails de la frontière afghane fixée par l'article précédent". Article 2, 166 Parry 333. In fulfilling their duties the Commissioners were to take due account of "des Localités et des nécessités, et du bien-être des populations locales". Article 3, ibid. 334. According to the London Protocol of 10 September 1885, the British gave up the source of water supply, some 1 mile above the frontier, of the Penjdeh Valley between the Murghab and the Kushan in the northwestern part of Afghanistan, as well as the Penjdeh Valley itself where the Russians had pastured sheep exclusively, in exchange for the withdrawal on the part of the Russians of their claim to the left bank of the Amu Darya (Oxus) to the east. As the British Commissioner reported to the Foreign Office,

"Under these circumstances, in exchange for a belt of from 12 to 16 miles of pasturage along the frontier up to the Oxus, I have agreed to give up the head of the Kashan Canal, which is about 1 mile above the present frontier. ..." (Communication from Sir W. Ridgeway to the Earl of Rosenberg, 14 May 1886. C. 5235 (1887), No. 107, p. 71.)

He further reported:

"It was after consideration of these facts that Her Majesty's Government authorized me to negotiate a settlement according to which the Ameer (=of Afghanistan) should restore to the Sariks most of the lands of which they had been deprived between the Kushk and Murghab, in exchange for the withdrawal of the Russian claims to all the districts at present in the possession of the Afghans on the Oxus, and to the wells and pastures necessary for the prosperity of the Uzbeks of Afghan Turkeskan." (Communication from Col. Sir West Ridgeway to the Marquis of Salisbury, London, 27 July 1887. C. 5114 (1887), No. 3, p. 2.)

That afforded the basis for the final protocol of 22 July 1887. Thus the procedure which started as a quasi-arbitral joint commission, with powers of giving some equitable considerations in its work of demarcation, ended in a diplomatic settlement. See 169 Parry 410-416.

398. 11 RIAA 115.

399. Ibid. 116.

400. Article 2 of the Treaty of 11 June 1891. 89 BFSP 715.

401. Ibid. 748.

402. Ibid. 741.

403. Ibid. 748.

404. For the text of Annex IV see Republic of Chile, supra note 43, p. 350, para. 4.

405. Shaw, Malcolm, "The Beagle Channel Arbitration Award", 6 International Relations 430, 431 (1978).
406. The compromis of 3 April 1913, Article 2. 11 RIAA 487.
407. Ibid. 507.
408. Republic of Chile, supra note 43, p. 98, para. 46.
409. Basis of Arrangement accepted by the Governments of Honduras and Nicaragua, 13 March 1961, paragraph 4(b). 30 ILR 77 (1966).
410. Decision. Ibid. 87.
411. Ibid. 85.
412. Ibid. 78.
413. Ibid. 88.
414. Individual opinion of Judge Hudson, PCIJ Publications, Series A/B, No. 70, pp. 76-77; ICJ Reports, 1969, p. 48, para. 88; ICJ Reports, 1982, p. 60, para. 71; ICJ Reports, 1985, para. 45.
415. The Special Agreement of 10 June 1977 between Tunisia and Libya, Article 1, ICJ Reports, 1982, p. 21, para. 2, p. 23, para. 4; the United States submission in the Gulf of Maine case, ICJ Reports, 1984, p. 258, para. 12, p. 261, para. 13; the Libyan submission in the Libya-Malta Continental Shelf case, ICJ Reports, 1985, para. 11.
416. The Statute of the International Court of Justice, Article 38, paragraph 1.
417. See Chapter II.
418. 5 RIAA 414. In more general terms Dr. Max Huber describes equity in its strict sense in his "Observations" in response to M. Eugène Borel's Rapport to the Institut de Droit International on "La Compétence du Juge International en Équité" of 1934:
"La conception la plus étroite de l'équité est celle qui comporte, entre plusieurs interprétations possibles du droit, celle qui tient le mieux compte de la situation individuelle des parties en litige et de la balance des droits et obligations correspondants."
Institut de Droit International, 38 Annuaire 233 (1934).
419. ICJ Reports, 1969, p. 49, para. 90, p. 50, para. 92.
420. ICJ Reports, 1982, p. 59, para. 70, where the Court says:
"The result of the application of equitable principles must be equitable. ... It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. ..."

- 421. U.N. Document A/CONF.62/L.78, p. 34.
- 422. ICJ Reports, 1982, p. 49, para. 49.
- 423. ICJ Reports, 1969, p. 50, para. 92.
- 424. ICJ Reports, 1982, p. 109, para. 35.

Note: Chapter IV

1. ICJ Reports, 1969, p. 33, para. 47.
2. Ibid., p. 53, para. 101.
3. A/CONF.62/WP.10/Rev.1, p. 57; A/CONF.62/WP.10/Rev.2, p. 59; A/CONF.62/WP.10/Rev.3, p. 34.
4. Cmnd. 7438, pp. 59-60, para. 97; ICJ Reports, 1982, p. 92, para. 133; ICJ Reports, 1984, pp. 299-300, para. 112; ICJ Reports, 1985, para. 79.
5. The North Sea Continental Shelf cases of 1969, ICJ Reports, 1969, p. 48, para. 88.
6. Judge Oda's dissenting opinion in the Tunisia-Libya Continental Shelf case, ICJ Reports, 1982, p. 256, para. 158.
7. ICJ Pleadings, 1968, Vol. II, p. 61.
8. ICJ Reports, 1982, p. 59, para. 70.
9. ICJ Reports, 1969, p. 49, para. 90; ibid., p. 50, para. 92.
10. Cmnd. 7438, p. 48, para. 70; ibid., pp. 59-60, para. 97.
11. ICJ Reports, 1982, p. 60, para. 71.
12. ICJ Reports, 1984, p. 292, para. 89.
13. ICJ Reports, 1985, para. 79.
14. The compromis of 14 March 1908, in its Article 3, provided that the tribunal should decide the boundary line "en tenant compte des circonstances de fait et des principes du droit international" (emphasis added). 11 RIAA 153-154. The tribunal accordingly took due account of the "circonstances de fait" in the delimitation of the boundary line. Ibid. 161-162.
15. For the text of the Treaty, see 18 ILM 291-331.
16. Burmester, H., "The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement", 76 AJIL 349 (1982).
17. International Law Association, Report of the 52nd Conference, Helsinki, 1966, p. 488. Article IV reads:
"Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."
Ibid., p. 486.
18. The "relevant factors" listed in Article V, paragraph (2), are:
"(a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

- (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
- (c) the climate affecting the basin;
- (d) the past utilization of the waters of the basin, including in particular existing utilization;
- (e) the economic and social needs of each basin State;
- (f) the population dependent on the waters of the basin in each basin State;
- (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
- (h) the availability of other resources;
- (i) the avoidance of unnecessary waste in the utilization of waters of the basin;
- (j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
- (k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State."

Ibid., p. 488.

19. Cukwurah, A. O., The Settlement of Boundary Disputes in International Law, 1967, p. 38.

20. Achour, Yadh Ben, "L'affaire du plateau continental tuniso-libyen (Analyse empirique)", 110 Journal du Droit International 265 (1983).

21. Wortley, B. A., Jurisprudence, 1967, p. 372.

22. De Visscher, Charles, Problèmes de Confins de Droit international public, 1969, p. 25.

23. Ibid.

24. 1 RIAA 869.

25. Ibid. 832.

26. Ibid. 869.

27. Preamble of the compromis, ibid. 831.

28. It is interesting to note a comment by an expert who acted as the Agent for the United States Government in the Gulf of Maine case:

"However, we are unaware of any modern international maritime boundary adjudication where a state received the boundary that it claimed. That experience confirms that claimants are not likely to receive what they request, but rather a compromise of some sorts. Thus, it may serve the interest of a party to claim the maximum to which it is conceivably entitled."

Robinson, Davis R., et al., "Some Perspectives on Adjudicating before the World Court: The Gulf of Maine Case", 79 AJIL 591 (1985).

29. On this type of boundary arbitration, R. Y. Jennings comments:
 "... there is usually some legal truth on both sides of the argument and what seems to the uninstructed eye to be a mere compromise may in fact be an attempt to do justice to the weight

and persuasiveness of the argument on one side and on the other." (Emphasis original)

Jennings, R. Y., "The Argentine-Chile Boundary Dispute: A Case Study", International Disputes: The Legal Aspects (Report of a Study Group of the David Davies Memorial Institute of International Studies), 1972, p. 324.

30. See on this point Article 12 of the International Law Commission's Model Rules on Arbitral Procedure, ILC Year Book, 1958, Vol. II, pp. 8, 14. See also Article 19 of the "Projet de règlement pour la procédure arbitrale internationale" of 28 August 1875 of l'Institut de Droit International, Wehberg, Hans, Tableau Général des Résolutions (1873-1956), 1957, p. 152. For a discussion of the subject, especially the point at issue, see Fitzmaurice, Sir Gerald, "The Problem of Non-Liquet: Prolegomena to a Restatement", Mélanges offerts à Charles Rousseau: La Communauté internationale, 1974, pp. 92, 101.

31. For example, in respect of the British claims, see "Political control", Summary, British Case, pp. 119-120; British Counter-Case, pp. 130-142. See, in respect of the Venezuelan claims, "Conclusive propositions of fact", Venezuelan Case, Vol. 1, pp. 221-229; Venezuelan Counter-Case, Vol. 1, pp. 71-72.

32. For example, Venezuelan Case, Vol. 1, pp. 155-156; Venezuelan Counter-Case, Vol. 1, p. 33.

33. For example, British Case, pp. 15, 37, 52-54, 78.

34. Venezuela subsequently contended that the award line was unjustified, and as a result of the negotiations concluded with the United Kingdom an Agreement to Resolve the Controversy over the Frontier between Venezuela and British Guiana on 17 February 1966. Article 1 of the Agreement provides:

"A Mixed Commission shall be established with the task of seeking satisfactory solutions for the practical settlement of the controversy between Venezuela and the United Kingdom which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void."

561 UNTS 323.

35. Jennings, supra note 29, pp. 324-325.

36. Argentine Cuonter-Memorial, Vol. 1, pp. 133-134.

37. 16 RIAA 173.

38. Ibid.

39. Chile stated the "essential issue" in these words:

"The essential issue between the Parties is thus whether, as Argentina contends, these words (=the controversial part of the 1902 award) require that the course of the boundary shall follow the Encuentro along the minor channel and be connected to the Cerro Virgen, or, as Chile contends, these words require that the course of the boundary shall follow the Encuentro along the major channel and thus place the whole area west of the line of

the Chilean submission within Chilean territory." Chilean Memorial, Vol. 1, p. 195. The key passage of the 1902 Award reads: "the boundary shall follow the River Encuentro to the peak called Virgen", and the corresponding passage of the Report of the Tribunal appointed by the Arbitrator, which constituted the basis of the Arbitrator's Award, reads: "[the boundary] shall follow the Encuentro along the course of its western branch to its source on the western slopes of Cerro Virgen". Ibid.; 9 RIAA 37, 42.

40. Mr. E. Lauterpacht, counsel for the Government of Chile, during his oral argument on the 9th day, characterized the Court of Arbitration as "a practical Court charged with a task of political, economic and social significance", and went on to say, "The task is not an academic one, and it cannot properly be discharged in a vacuum." Corrected Transcript of Oral Hearings, Vol. II, p. 95.

41. ICJ Reports, 1969, p. 50, para. 95.

42. International Law Association, supra note 17, p. 488. For a comment on this clause, see Handl, Günther, "The Principle of 'Equitable Use' As Applied to Internationally Shared Natural Resources: Its Role in Resolving Potential International Disputes over Transfrontier Pollution", 14 RBDI 48 (1978-1979). For a similar comment by the same author, see "Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited", 13 CYBIL 176 (1975).

43. ICJ Reports, 1982, p. 59, para. 70.

44. Rhee, Sang-Myon, "Sea Boundary Delimitation between States before World War II", 76 AJIL 588 (1982).

45. Miyoshi, Masahiro, "The Delimitation of Continental Shelf Boundaries and 'Equitable Principles'" (in Japanese), Kikan Kaiyo-Jiho (Quarterly Review of Marine Affairs), No. 16 (February, 1980), p. 25. Davis R. Robinson and associates who represented the United States Government before the Chamber of the International Court of Justice in the Gulf of Maine case remark in a joint paper they wrote "while our memories are fresh":

"... in a court where only sovereign states can be parties, the judges in a given case may sense pressure to arrive at a decision that is acceptable to all."

Robinson, Davis R., et al., supra note 28, at 590.

46. Handl, supra note 42, 14 RBDI 44 (1978-1979).

47. Schachter, Oscar, Sharing the World's Resources, 1977, p. 24.

48. Cukwurah, supra note 19, pp. 205-206.

49. Dennis, William Cullen, "Compromise - the Great Defect of Arbitration", 11 Columbia Law Review 493-513 (1911).

50. Id., "The Venezuela - British Guiana Boundary Arbitration of 1899", 44 AJIL 727 (1950).

51. Akehurst, Michael, "Equity and General Principles of Law", 25 ICLQ 801-825 (1976).

52. "Memorial submitted by the Government of the Federal Republic of Germany", ICJ Pleadings, North Sea Continental Shelf cases, 1968, Vol. 1, pp. 30-36; "Reply submitted by the Government of the Federal Republic of Germany", ibid., pp. 391-395; "Argument of Professor Jaenicke", ICJ Pleadings, North Sea Continental Shelf cases, 1968, Vol. 2, p. 32; "Argument of Professor Oda", ibid., p. 61.

But when Sir Humphrey Waldock, counsel for Denmark and the Netherlands, pointed out that the Federal Government had failed to provide the Court with anything to assist it in its appreciation of the alleged principle of "just and equitable share" (Ibid., p. 118), Professor Jaenicke, the German Agent, replied in a manner which does not necessarily link the alleged principle to "general principles of law" (Ibid., p. 179), thereby revealing a slight difference from Professor Oda's treatment of it as a "general principle of law".

53. ICJ Reports, 1969, p. 48, para. 88. Cf. Judge Hudson's separate opinion in the Diversion of Water from the Meuse case, PCIJ Publications, Series A/B, No. 70, p. 76.

54. See, for example, Professor Oda's reply, which quotes Judge Hudson's separate opinion in the Meuse case. ICJ Pleadings, supra note 52, Vol. 2, p. 200.

55. See Chapter II, 1, (2): "The Statute of the Permanent Court of International Justice".

56. Schwarzenberger, Georg, The Dynamics of International Law, 1976, pp.61-62.

57. For a comprehensive comparative law study of principles of equity, see Newman, Ralph A. (ed.), Equity in the World's Legal Systems: A Comparative Study, 1973.

58. De Visscher, Charles, "Contribution à l'Etude des Sources du Droit international", 14 Revue de Droit International et de Législation Comparée 415 (1933); Id., "Observations" on Eugène Borel's "Rapport préliminaire - La Compétence du Juge International en Equité", Institut de Droit International, 38 Annuaire 239 (1934). By contrast, H. Lauterpacht seems to include equity in "general principles". For he says: "The equitable principles are included in the general principles of law which the Court is bound to apply by virtue of Article 38(3) of the Statute." Lauterpacht, H., International Law: Collected Papers (edited by E. Lauterpacht), Vol. 1, 1970, p. 257.

59. De Visscher, Charles, De l'Equité dans le Règlement arbitral ou judiciaire des Litiges de Droit international public, 1972, pp. 6-7.

60. But this does not exclude the possibility that equity may be considered as a material source of law. Cf. Reuter, Paul, Droit international public, 1958, pp. 85-86.

61. 1503rd Meeting on 19 June 1978. ILC Year Book, 1978, Vol. 1, p. 157.

62. McDowell, Gary L., Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy, 1982, pp. 5-6.
63. Aristotle, The Art of Rhetoric, 1354a-b, as quoted in McDowell, supra note 62, p. 18.
64. Lauterpacht, Eli, "Oil and Gas Resources of British Waters: Some Problems of International Law", paper presented at the Petroleum Law Seminar sponsored by the International Bar Association in Cambridge, 8-13 January 1978, p. 11.
65. Habicht, Max, The Power of the International Judge to Give a Decision "ex aequo et bono", 1935, p. 72.
66. Akehurst, supra note 51, at 808-811. The same author writes to the same effect in his book review of Charles de Visscher's De l'Equité dans le Règlement arbitral ou judiciaire des Litiges de Droit international public, 1972. 46 BYBIL 543-544 (1972-1973).
67. Akehurst, supra note 51, at 813-825.
68. Ibid. 801.
69. Fitzmaurice, Sir Gerald G., "The Future of Public International Law and of the International Legal System in the Circumstances of Today", Institut de Droit International, Livre du Centenaire 1873-1973: Evolution et perspectives du droit international, 1973, pp. 325-326.
70. Ibid., p. 325.
71. Blecher, M. D., "Equitable Delimitation of Continental Shelf", 73 AJIL 87-88 (1979).
72. De Visscher, supra note 59, p. 3.
73. ICJ Reports, 1969, p. 53, para. 101.
74. See critical comments by Judge Gros in his dissenting opinion in the Gulf of Maine case. ICJ Reports, 1984, p. 383, para. 38; p. 377, para. 26.
75. Ibid., p. 388, para. 47.
76. Ibid., p. 377, para. 26.
77. Charney, Jonathan I., "Ocean Boundaries between Nations: A theory for Progress", 78 AJIL 585, 596-606 (1984).
78. Ibid. 606.
79. Ibid. 597. The author elaborates on these five steps, ibid. 598-606.
80. Francioni, Francesco, "Compensation of Nationalisation of Foreign Property: The Borderland between Law and Equity", 24 ICLQ 279 (1975).

81. General Assembly resolution 1803 (XVII), I, para 4.
82. General Assembly resolution 3171 (XXVIII), para 3.
83. General Assembly resolution 3281 (XXIX), Article 2, paragraph 2(c).
84. Francioni, supra note 80, at 278-280.
85. Bedjaoui, Mohammed, Towards a New International Economic Order, 1979, pp. 119.
86. ILC Year Book, 1966, Vol. I, Part II, p. 17, para. 74.
87. Ibid., p. 18, para. 78.
88. Kelly, G. M., "The Temple Case in Historical Perspective", 39 BYBIL 467 (1963).
89. Ibid. 471.
90. Ibid. 470.
91. ICJ Reports, 1971, p. 31, para. 53.
92. McWhinney, Edward, "The Time Dimension in International Law, Historical Relativism and Intertemporal Law", in Makarczyk, Jerzy (ed.), Essays in International Law in Honour of Judge Manfred Lachs, 1984, p. 196.
93. Institut de Droit International, 56 Annuaire 536 (1975).
94. Cf. Article 8 of the Statute of the International Law Commission which runs:
 "At the election the electors shall bear in mind ... that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured."
95. ICJ Reports, 1962, p. 128.
96. Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Judicial Settlement of International Disputes: International Court of Justice, Other Courts and Tribunals, Arbitration and Conciliation - An International Symposium, 1974, p. 31.
97. Ibid., p. 157.
98. Ibid., p. 167.
99. Académie de Droit International de La Haye, L'Avenir du Droit international dans un Monde multiculturel, 1984, pp. 452-454.
100. Ibid., p. 454.

101. Schachter, Oscar, "The Role of the Institute of International Law and its Methods of Work - Today and Tomorrow: Special Report", Institut de Droit International, supra note 69, p. 412.

102. Ibid., p. 413.

103. See Prott, Lyndell V., The Latent Power of Culture and the International Judge, 1979, p. 203, where the author states:

"The strong influence of the British and French legal systems on the practice of the International Court generally is plainly evident. The law to be applied was of course early influenced by the concepts native to those systems. ... Their long diplomatic and arbitral experience (cf. Britain's pioneering participation through the Jay Treaty of 1794 and the Alabama Arbitration of 1872) led to a similarly strong influence on matters of procedure and evidence. The use of French and English by history and tradition, as the languages of most international tribunals, led of course to the introduction of certain legal concepts of these systems such as those of 'equity' and 'ordre public' quite early in the history of international jurisprudence."

Notes: Conclusions

1. See Introduction and Chapters II and III.
2. See the attached Bibliography.
3. Akehurst, Michael, "Equity and General Principles of Law", 25 ICLQ 808-812 (1976).
4. Mikazuki, Akira, Hogaku-Nyumon (An Introduction to Jurisprudence), 1982, p. 272.
5. Ibid.
6. Decencièrre-Ferrandièrre, A., "Quelque Réflexions touchant le Règlement des Conflits internationaux", 36 RGDIP 432 (1929), where the author says:
"Le propre du droit, c'est de prévoir d'avance la solution qui devra être donnée. Il correspond à une idée d'ordre et de sécurité: même s'il s'inspire de la justice, il ne peut jamais la réaliser complètement. Il ne peut la réaliser complètement parce qu'il est impossible de savoir, au moment où la norme est posée, si son application sera juste ou non dans l'avenir. Cela dépendra de circonstances qu'on ne peut connaître d'avance avec certitude, car l'homme ne peut prévoir l'avenir."
7. Wortley, B. A., Jurisprudence, 1967, p. 390.
8. Reuter, Paul, "Quelques réflexions sur l'équité en droit internatinoal", 15 RBDI 185-186 (1980).
9. Brown, Brendan F., "Equity in the Law of the United States of America", in Newman, Ralph A. (ed.), Equity in the World's Legal Systems: A Comparative Study, 1973, p. 222.
10. Lauterpacht, Hersch, Private Law Sources and Analogies of International Law (With special reference to international arbitration), 1927, pp. 298-299.
11. Ibid., p. 303.
12. De Visscher, Charles, De l'Equité dans le Règlement arbitral ou judiciaire des Litiges de Droit international public, 1972, p. 3, where the learned author states:
"L'équité apparaît dans le plan judiciaire comme une justice plus ou moins individualisée. Elle se conçoit par rapport à la règle dont elle invite à se départir dans la mesure où l'exige une justice adaptée à l'espèce."
13. Bardonnnet, Daniel, "Equité et Frontières terrestres", in Mélanges offerts à Paul Reuter: Le Droit international: Unité et Diversité, 1981, p. 37.

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CORRECTIONS

- P. 11 Under 4: for 'on' read 'of'.
- P. 13 For 'Matrens NRG' read 'Martens NRG'.
- P. 18 Para. 2, line 14: for 'were' read 'was'.
- P. 21 Main para. 2, line 1: for 'problematique' read
"problematique".
- P. 23 Third quotation, line 6: for 'function' read
'fonction'.
- P. 26 Under (2), para. 1, line 7: for 'synonymous'
read 'synonymous'.
- P. 27 Para. 2, line 11: for 'Katch' read 'Kutch'.
Para. 2, line 15: for 'puet' read 'peut'.
- P. 31 Para. 4, line 3: for 'synonymous' read
'synonymous'.
- P. 51 First quotation, line 5: for 'composteurs' read
'compositeurs'.
- P. 66 First quotation, line 2: for 'La Haya' read 'La
Haye'.
- P. 72 Main para. 1, line 1: for 'mentioned' read
'above-mentioned'.
- P. 113 Para. 2, line 9: for 'setting' read 'settling'.
- P. 120 Under (2), para. 1: for the first sentence read
'In the Argentine-Chile Frontier case of 1966,
the President of the Court of Arbitration gave
an equitable warning to Argentina, which provided
her with an opportunity to file with the Court
a relevant memorandum.'
- P. 123 Quotation, line 6: for 'ratifié' read 'ratifié'.
Quotation, line 15: for 'protugais' read
'portugais'.
- P. 129 Second quotation, line 15: for 'contiquity' read
'contiguity'.
- P. 135 First quotation, line 2: for 'Gracia á Dios' read
'Gracias á Dios'.
- P. 136 First quotation, line 10: for 'it' read 'il'.
- P. 137 Para. 2, line 4: for 'Queel' read 'Queen'.
- P. 143 Under f), para. 1, line 4: for '"Halastó)' read
'"Halastó")'.

- P. 153 Under (2) 1) a), para. 1, line 4: insert 'weight' after 'given'.
- P. 183 Last para., line 4: for 'internation' read 'international'.
- P. 189 First quotation, line 1: for 'au' read 'aux'.
Last quotation, line 1: for 'd'avid' read 'd'avis'.
- P. 195 Last quotation, line 3: for 'equiteis' read 'equities'.
- P. 222 Main para. 1, line 9: for 'loose' read 'lose'.
- P. 262 Para. 2, line 22: for 'order' read 'ordre'.
- P. 263 Line 4: for 'Stated' read 'stated'.
Quotation, line 2: for 'annuled' read 'annulled'.
Last para., line 18: for 'equivolcal' read 'equivocal'.
- P. 282 Note 39, line 8: for 'synonimous' read 'synonymous'.
- P. 287 Note 27: for 'Reflexions' read 'Considerations'.
- P. 309 Note 3, first quotation, line 8: for 'criticezed' read 'citicized'.
Note 3, third quotation, line 3: for 'heresay' read 'hearsay'.
- P. 310 Note 7, quotation, line 2: for 'protée' read 'portée'.
Note 7, quotation, line 6: for 'sourait' read 'saurait'.
- P. 311 Note 19, line 7: for 'cristalized' read 'crystallized'.
Note 19, quotation, line 12: for 'Minquieres' read 'Minquiers'.
- P. 317 Note 115, lines 1-2: delete 'a member of'.
- P. 331 Note 387: before '33 AJIL 357 (1939)' insert 'Wright, Quincy, "The Arbitration of the Aaroo Mountain", '.
- P. 332 Note 397 (continued), line 1: for 'disucssion' read 'discussion'.
- P. 350 Ninth entry: for 'Nortchcutt' read 'Northcutt'.